(27,915)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1920.

No. 558.

WEEDS, INC., AND GURDON H. SMITH, PLAINTIFFS IN ERROR,

vs.

THE UNITED STATES OF AMERICA.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF NEW YORK.

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a The President of the United States to the Honorable Judges of the District Court of the United States for the Northern District of New York, Greeting:

Whereas, in the record and proceedings, as also in the rendition of the judgment of a cause which is now in the said District Court before you or some of you between the United States of America, plaintiff, and Weeds, Inc. and Gurdon H. Smith, defendants, there was drawn in question the constitutionality of a law of the United States, to wit, an Act entitled, "An Act to Provide Further for the National Security and Defense by encouraging the production, conserving the supply, and cont-olling the distribution of food products and fuel," approved August 10, 1917, as amended by an Act entitled an Act to amend the said last mentioned Act approved October 22, 1919, in that it was claimed that said law is null and void and of no effect because the same is in contravention of the provisions of the Constitution of the United States in that it deprives the defendants of their liberty and property without due process of law, all contrary to the provisions of Article V of the amendments to the Constitution of the United States, and also in that it is so general, speculative, uncertain and indefinite in its terms and provisions that it does not define or specify what facts or acts shall constitute a violation thereof or an offence thereunder, and does not enable a person to determine, decide, or know in advance what specific act or acts, thing or things, are prohibited thereby or are permitted thereunder, but leaves it to be determined after the event or act whether such event or act was or was not a violation thereof, thereby not only making it possible but inevitable that an act committed or a thing done in one locality may be legal, innocent and valid, while the same act committed or thing done in another b locality under like circumstances and at the same time or even in the same locality and by the same person will be held to be a criminal offense, all in violation of the provisions of Articles V and VI of the amendments of the Constitution of the United States; and

Whereas, there is manifest error in said cause to the great damage of the said defendants, Weeds, Inc. and Gurdon H. Smith, the petitioners in error, as by their complaint appears; and

Whereas, we are willing that if there is error it should be duly corrected and full and speedy justice done to the parties aforesaid,

In this behalf, we command you, therefore, if judgment be given therein, that you send under seal of your Court the record and proceedings in said cause, with all things concerning the same, to the Supreme Court of the United States, together with this writ, within such time as may be necessary in order that you have the same at Washington on the 3d day of September, 1920, that the record and proceedings aforesaid may be inspected by the Supreme Court of the United States to be then and there held in order that justice may be done; and that said Supreme Court may cause further to be done

therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness, the Honorable Edward Douglass White, Chief Justice of the said Supreme Court, the 6 day of August in the year of our Lord one thousand nine hundred and twenty.

[Seal of United States District Court, N. Dist. of New York.]

C. W. HIGGISON,
Clerk of the United States District Court
for the Northern District of New York.

c The foregoing writ is hereby allowed and a bond in the penal sum of Thirty-five Thousand Dollars ($35,000) conditioned that the petitioners in error shall prosecute said writ to effect and answer all damages and costs if they fail to make good their plea, having been heretofore duly given, approved and filed, it is further ordered that said writ of error shall operate as a supersedeas, and the Clerk is hereby directed to stay the mandate of the District Court of the United States for the Northern District of New York until the further order of the Court.

Dated August 3, 1920.

GEO. W. RAY,
United States District Judge.

[Endorsed:] U. S. District Court Northern District of New York. Weeds, Inc. and Gurdon H. Smith, Plaintiffs in error, vs. United States of America, Defendant in error. Writ of Error. Hinman, Howard & Kattell, Attorneys for plaintiffs in error, Security Mutual Life Bldg., Binghamton, N. Y. U. S. District Court N. D. of N. Y. Filed Aug. 6, 1920, at — o'clock — M. C. W. Higgison, Clerk. Hinman, Howard & Kattell, Binghamton, New York.

1 Pleas in the District Court of the United States of America in and for the Northern District of New York.

At a stated session, held at the Court Room, in the City of Syracuse in the said Northern District of New York, on the 28th day of May, in the year of our Lord one thousand nine hundred and twenty, before the Hon. Martin T. Manton, Judge of the said Court, assigned to keep the peace of the said United States of America, in and for the said District, and also to hear and determine divers Felonies, Misdemeanors, and other offences against the said United States of America, in said District committed.

NORTHERN DISTRICT OF NEW YORK, *ss:*

Be it remembered, that on the 27th day of April, A. D. 1920, at a stated session of said Court, held at Syracuse in and for said District, before the aforesaid Judge thereof, the Grand Inquest of the United States, inquiring for the said Northern District of New York, having been duly summoned, empanelled, charged and sworn, according to

law, came into said Court before the Judge thereof, and brought into and presented to said Court, a true Bill of Indictment against Weeds, Inc., and Gurdon H. Smith and Charles A. Weed, which was then and there filed in said Court, and said Indictment is in these words:

2 United States District Court for the Northern District of New York.

At a Stated Term of the U. S. District Court begun and held at the U. S. Court Rooms in the City of Syracuse, N. Y., commencing on the 6th day of April, 1920, before the Hon. Harland B. Howe, Judge of said Court.

NORTHERN DISTRICT OF NEW YORK, *ss:*

The Grand Jurors of the United States of America, duly chosen and sworn, upon their oaths and affirmations, do present and indict that Weeds, Inc., now is, and at all times herein mentioned was, a domestic corporation duly organized and existing under and by virtue of the Laws of the State of New York, conducting and operating a general merchandise store at No-. 83-85 Court Street, in the City of Binghamton, State and Northern District of New York and within the jurisdiction of this court, and that at all such times Charles A. Weed was the President of said corporation actually engaged in the management thereof, and Gurdon H. Smith was at all the times herein mentioned General Manager in said store in said city of Binghamton said Weeds, Inc., Charles A. Weed and Gurdon H. Smith are hereinafter designated as defendants.)

That on or about the 1st day of November, 1919, at said City of Binghamton, the said defendants did conspire, combine, arrange and agree together to exact and to aid and abet in exacting excessive prices for certain necessaries, to-wit, wearing apparel.

That thereafter and between the 1st day of November, 1919, and the 1st day of April, 1920, and in furtherance of said conspiracy and agreement and for the purpose of effecting the object of the same, the said defendants did place and cause to be placed upon sale in their said store in said city of Binghamton various necessaries, to-wit, articles of clothing at prices and figures greatly in advance of
3 the actual cost price thereof and which necessaries are hereinafter enumerated with the cost and selling prices thereof set forth as follows, to-wit:

Commodity.	Lot No.	Cost.	Cost price, marked for sale.
Boys' Suits	A900–12¾	$7.25	$12.75
Wash Suits	B225875	4.16	8.75
" "	B225675	3.45	6.75
"	B225275	1.10	2.75
Hosiery	B1350	2.02	3.50
"	D1850	4.67	8.50
Knit Goods	E23½	1.40	3.50
" "	E24	1.36	4.00
Union Suits	C8–6	3.62½	6.00
" "	C6–6	3.39	6.00
Shirts	S72	1.00	2.00
"	S2165	1.12½	1.65
"	15	3.00	5.00
"	11–5	2.87½	5.00
"	9–3	1.87½	3.00
Silk Shirts	610	6.00	10.00
" "	112	7.00	12.00
Hats	Z1–18	10.25	18.00
"	B4	6.50	12.00
Cap	A1	6.00	10.00
Men's Suits	W11	.37½	1.00
" "	36360	30.50	60.00
" "	4760	37.50	60.00
"	32375	40.00	75.00
Overcoats	31550	22.05	50.00
"	31875	31.66	75.00

That at all the times herein mentioned a state of war existed in the United States with the Imperial German Government and that said defendants then and there were not farmers, gard-ners, horticulturists, vineyardists, planters, ranchmen, dairymen, stockmen or other agriculturists and that said articles of clothing were not products produced or raised upon land, leased or cultivated by said defendants, all of which was and is contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America.

4

Count Two.

And your Grand Jurors aforesaid, upon their oaths and affirmations aforesaid, do further present and indict that Weeds, Inc., now is, and at all times herein mentioned was, a domestic corporation duly organized and existing under and by virtue of the Laws of the State of New York, conducting and operating a general merchandise store at No. 83-85 Court Street, in the City of Binghamton, State and Northern District of New York and within the jurisdiction of this court, and that at all such times Charles A. Weed was the President of said corporation actually engaged in the management thereof, and

Gurdon H. Smith was at all the times herein mentioned General Manager of said store in said city of Binghamton said (Weeds, Inc., Charles A. Weed and Gurdon H. Smith are hereinafter designated as defendants.)

That prior to the 8th day of January, 1920, the said defendants purchased and caused to be purchased certain necessaries, to-wit, one man's suit No. 38040 for the sum of $20.00 and then and there placed same upon sale in said store.

That thereafter and on or about the 8th day of January 1920, at said store in said city of Binghamton, said defendants did unlawfully, knowingly, and wilfully make and cause to be made and aid and abet in making an unjust and unreasonable rate and charge in handling and dealing in and with certain necessaries, to-wit, said men's suit No. 38040, in that said defendants did sell and deliver and cause to be sold and delivered to J. H. Nelson at Binghamton, N. Y., the said suit for the sum of $40.00, thereby making and unjust and unreasonable rate and charge of $20.00 in handling and dealing in and with said suit.

That at all the times herein mentioned a state of war existed in the United States with the Imperial German Government and that said defendants then and there were not farmers, gard-ners, horticulturists, vineyardists, planters, ranchmen, dairymen, stockmen or other agriculturists and that said article of clothing was not a product produced or raised upon land, leased or cultivated by said defendants, contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America.

Count Three.

And your Grand Jurors aforesaid upon their oaths and affirmations aforesaid, do further present and indict that Weeds, Inc., now is, and at all times herein mentioned was, a domestic corporation, duly organized and existing under and by virtue of the Laws of the State of New York, conducting and operating a general merchandise store at No. 83-85 Court Street, in the city of Binghamton, State and Northern District of New York and within the jurisdiction of this court, and that at all such times Charles A. Weed was the President of said corporation actually engaged in the management thereof, and Gurdon H. Smith was at all the times herein mentioned General Manager of said store in said city of Binghamton said (Weeds, Inc., Charles A. Weed and Gurdon H. Smith are hereinafter designated as defendants.)

That prior to the 9th day of January, 1920, the said defendants purchased and caused to be purchased certain necessaries, to-wit, one man's suit No. 20040 for the sum of $12.10 and then and there placed same upon sale in said store.

That thereafter and on or about the 9th day of January 1920, at said store in said city of Binghamton, said defendants did unlawfully, knowingly and wilfully make and cause to be made and aid and abet in making an unjust and unreasonable rate and charge in handling and dealing in and with certain necessaries, to-wit, said man's suit

No. 20040, in that said defendants, did sell and deliver and cause to be sold and delivered to S. J. Nunn, 324 Chenango St., Bing-
6 hamton, N. Y., the said suit for the sum of $40.00, thereby making an unjust and unreasonable rate and charge of $27.90 in handling and dealing in and with said suit.

That at all the times herein mentioned a state of war existed in the United States with the Imperial German Government and that said defendants then and there were not farmers, gardners, horticulturists, vineyardists, planters, ranchmen, dairymen, stockmen or other agriculturists and that said article of clothing was not a product produced or raised upon land, leased or cultivated by said defendants, contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America.

Count Four.

And your Grand Jurors aforesaid upon their oaths and affirmations aforesaid, do further present and indict that Weeds, Inc., now is, and at all the times herein mentioned was, a domestic corporation, duly organized and existing under and by virtue of the Laws of the State of New York, conducting and operating a general merchandise store at No. 83085 Court Street, in the city of Binghamton, State and Northern District of New York and within the jurisdiction of this court, and that at all such times Charles A. Weed was the President of said corporation actually engaged in the management thereof, and Gurdon H. Smith was at all the times herein mentioned General Manager of said store in said city of Binghamton said (Weeds, Inc., Charles A. Weed and Gurdon H. Smith are hereinafter designated as defendants.)

That prior to the 9th day of January, 1920, the said defendants purchased and caused to be purchased certain necessaries, to-wit, one man's suit No. 38945 for the sum of $23.50 and then and there placed same on sale in said store.

7 That thereafter and on or about the 9th day of January, 1920, at said store in said City of Binghamton, said defendants did unlawfully, knowingly and wilfully make and cause to be made and aid and abet in making an unjust and unreasonable rate and charge in handling and dealing in and with certain necessaries, to-wit, said man's suit No. 38945, in that said defendants did sell and deliver and cause to be sold and delivered to S. J. Nunn, 324 Chenango St., Binghamton, N. Y., the said suit for the sum of $45.00, thereby making an unjust and unreasonable rate and charge of $21.50 in handling and dealing in and with said suit.

That at all the times herein mentioned a state of war existed in the United States with the Imperial German Government and that said defendants then and there were not farmers, gardners, horticulturists, vineyardists, planters, ranchmen, dairymen, stockmen or other agriculturists and that said article of clothing was not a product produced or raised upon land, leased or cultivated by said defendants, contrary to the form of the statute in such case made and pro-

vided and against the peace and dignity of the United States of America.

Count Five.

And your Grand Jurors aforesaid upon their oaths and affirmations aforesaid, do further present and indict that Weeds, Inc., now is, and at all the times herein mentioned was, a domestic corporation, duly organized and existing under and by virtue of the Laws of the State of New York, conducting and operating a general merchandise store at No. 83085 Court Street, in the City of Binghamton, State and Northern District of New York and within the jurisdiction of this court, and that at all such times Charles A. Weed was the President of said corporation actually engaged in the management thereof, and Gurdon H. Smith was at all the times herein mentioned General Manager of said store in said city of Binghamton said

8 (Weeds, Inc., Charles A. Weed and Gurdon H. Smith are hereinafter designated as defendants.)

That prior to the 21st day of January, 1920, the said defendants purchased and caused to be purchased certain necessaries, to-wit, one suit No. 22050 for the sum of $17.82 and then and there placed same on sale in said store.

That thereafter and on or about the 21st day of January 1920, at said store in said city of Binghamton, said defendants did unlawfully, knowingly and wilfully make and cause to be made and aid and abet in making an unjust and unreasonable rate and charge in handling and dealing in and with certain necessaries, to-wit, said suit No. 22050 in that said defendants did sell and deliver and cause to be sold and delivered to B. Perder, 33 Edwards St., Binghamton, N. Y., the said suit for the sum of $45.50, thereby making an unjust and unreasonable rate and charge of $27.68 in handling and dealing in and with said suit.

That at all the times herein mentioned a state of war existed in the United States with the Imperial German Government and that said defendants then and there were not farmers, gardners, horticulturists, vineyardists, planters, ranchmen, dairymen, stockmen or other agriculturists and that said articles of clothing was not a product produced or raised upon land, leased or cultivated by said defendants, contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America.

Count Six.

And your Grand Jurors aforesaid, upon their oaths and affirmations aforesaid, do further present and indict that Weeds, Inc., now is, and at all the times herein mentioned was, a domestic corporation, duly organized and existing under and by virtue of the Laws of the

9 State of New York, conducting and operating a general merchandise store at No. 83-85 Court Street, in the City of Binghamton, State and Northern District of New York and within the jurisdiction of this court, and that at all such times Charles A.

Weed was the President of said corporation actually engaged in the management thereof, and Gurdon H. Smith was at all the times herein mentioned General Manager of said store in said city of Binghamton said (Weeds, Inc., Charles A. Weed and Gurdon H. Smith are hereinafter designated as defendants.)

That prior to the 23rd day of January, 1920, the said defendants purchased and caused to be purchased certain necessaries, to-wit, 8 pairs of socks No. H4–1½ for the sum of $6.00 and then and there placed same on sale in said store.

That thereafter and on or about the 23rd day of January 1920, at said store in said city of Binghamton, said defendatns did unlawfully, knowingly and wilfully make and cause to be made and aid and abet in making an unjust and unreasonable rate and charge in handling and dealing in and with certain necessaries, to-wit, said socks No. H4–1½ in that said defendants did sell and deliver and cause to be sold and delivered to E. W. Mitchell, 34 Lewis St., Binghamton, N. Y., the said socks for the sum of $12.00, thereby making and unjust and unreasonable rate and charge of $6.00 in handling and dealing in and with said socks.

That at all the times herein mentioned a state of war existed in the United States with the Imperial German Government and that said defendants then and there were not farmers, gardners, horticulturists, vineyardists, planters, ranchmen, dairymen, stockmen or other agriculturists and that said article of clothing was not a product produced or raised upon land, leased or cultivated by said defendants, contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America.

10

Count Seven.

And your Grand Jurors aforesaid, upon their oaths and affirmations aforesaid, do further present and indict that Weeds, Inc., now is and at all the times herein mentioned was, a domestic corporation, duly organized and existing under and by virtue of the Laws of the State of New York, conducting and operating a general merchandise store at No. 83-85 Court Street, in the city of Binghamton, State and Northern District of New York and within the jurisdiction of this court, and that at all such times Charles A. Weed was the President of said corporation actually engaged in the management thereof, and Gurdon H. Smith was at all the times herein mentioned General Manager of said store in said city of Binghamton said (Weeds, Inc., Charles A. Weed and Gurdon H. Smith are hereinafter designated as defendants.)

That prior to the 29th day of January, 1920, the said defendants purchased and caused to be purchased certain necessaries, to-wit, one suit No. 30535 for the sum of $11.78 and then and there placed same on sale in said store.

That thereafter and on or about the 29th day of January, 1920, at said store in said city of Binghamton, said defendants did unlawfully, knowingly and wilfully make and cause to be made and aid

and abet in making an unjust and unreasonable rate and charge in handling and dealing in and with certain necessaries, to-wit, said suit No. 30535 in that said defendants did sell and deliver and cause to be sold and delivered to A. M. Pierson, 149 Susquehanna St., Binghamton, N. Y., the said suit for the sum of $29.50, thereby making an unjust and unreasonable rate and charge of $17.72 in handling and dealing in and with said suit.

That at all the times herein mentioned a state of war existed in the United States with the Imperial German Government and that said defendants then and there were not farmers, gardners, horticulturists, vineyardists, planters, ranchmen, dairymen, stockmen or other agriculturists and that said article of clothing was not a
11 product produced or raised upon land, leased or cultivated by said defendants, contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America.

Count Eight.

And your Grand Jurors aforesaid, upon their oaths and affirmations aforesaid, do further present and indict that Weeds, Inc., now is and at all the times herein mentioned was, a domestic corporation, duly organized and existing under and by virtue of the Laws of the State of New York, conducting and operating a general merchandise store at No. 83–85 Court Street, in the city of Binghamton, State and Northern District of New York, and within the jurisdiction of this court, and that at all such times Charles A. Weed was the President of said corporation actually engaged in the management thereof, and Gurdon H. Smith was at all times herein mentioned General Manager of said store in said city of Binghamton (said Weeds, Inc., Charles A. Weed and Gurdon H. Smith are hereinafter designated as defendants).

That prior to the 3rd day of March, 1920, the said defendants purchased and caused to be purchased certain necessaries, to-wit, one suit No. 35960 for the sum of $32.25 and then and there placed same on sale in said store.

That thereafter and on or about the 3rd day of March, 1920, at said store in said city of Bingha-ton, said defendants, did unlawfully, knowingly and wilfully make and cause to be made and aid and abet in making an unjust and unreasonable rate and charge in handling and dealing in and with certain necessaries, to-wit, said suit No. 35960, in that said defendants did sell and
12 deliver and cause to be sold and delivered to T. B. Carary, 315 Main St., Binghamton, N. Y., the said suit No. 35960 for the sum of $60.00, thereby making an unjust and unreasonable rate and charge of $27.75 in handling and dealing in and with said suit.

That at all times herein mentioned a state of war existed in the United States with the Imperial German Government and that said defendants then and there were not farmers, gardners, horticulturists, vineyardists, planters, ranchmen, dairymen, stockmen or other agri-

culturists and that said article of clothing was not a product produced or raised upon land leased or cultivated by said defendants, contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America.

JOHN W. DORSEY,
Foreman of the Grand Jury.
D. B. LUCEY,
U. S. Attorney in and for the Northern District of New York.

Endorsed: No. 2013. United States District Court, Northern District of New York, Syracuse Division. The United States of America *vis.* Weeds, Inc., Gurdon H. Smith. Indictment, Profiteering, Act Oct. 21, 1919, Lever Act. A True Bill; John W. Dorsey, Foreman. Filed Apr. 27, 1920. C. W. Higgison, Clerk. Apr. 27, '20, Def't Weeds, Inc., arraigned through G. H. Smith, Sec., and pleads not guilty. Defendant Gurdon H. Smith arraigned and pleads not guilty. May 25–27, 1920, Defendants tried. May 28, 1950, Defendants Weeds, Inc., and Gurdon H. Smith convicted on Counts 1, 2, 3, 4, 5, 7, & 8 of Indictment. Defendants sentenced to pay a fine of $1,000 on First Count of Indictment, and $5,000.00 upon each of Counts Two, Three, Four, Five, Seven, and Eight of said Indictment.

13 And on the 27th day of April, 1920, of the term of April, at the City of Syracuse, came the said defendants, Weeds, Inc., through G. H. Smith, its Secretary; and Gurdon H. Smith, into the said District Court.

And the said defendants, Weeds, Inc., and Gurdon H. Smith being duly arraigned upon the said Indictment, in open Court, and called upon to plead thereto, pleaded that they were not guilty of the offenses charged therein, in manner and form as the same are therein set forth, and of this they put themselves upon the country, and said United States of America did the like.

And the defendants having interposed a demurrer to the said Indictment, which was thereafter by the Court overruled;

Wherefore, let a jury be summoned, empanelled and sworn to try the said issue at the April term of said Court, in the year of our Lord one thousand nine hundred and twenty, at the City of Syracuse, in the said District;

And now, on this 28th day of May, of the term of April, one thousand nine hundred and twenty, aforesaid, come as well the Attorney of the United States for the Said District, as the said defendants, and come also the Jurors aforesaid, to-wit:

William Hirons,	Leon Lillie,	Edward P. Gray,
Charles Edminster,	James Brennan,	Walter Moon,
Frank Jewell,	George Sowarby,	W. Romaine Fisher,
George Burns,	James Burns,	Frank E. Bush,

and the said jurors to speak the truth of the matters within contained, being chosen, tried and sworn, upon their oaths say:

That the said defendants, Weeds, Inc., and Gurdon H. Smith, are guilty of the offenses charged in the First, Second, Third, Fourth, Fifth, Seventh, and Eighth Counts of the said Indictment in manner and form as the same are therein set forth; and thereupon, the said defendants, Weeds, Inc., by its proper officer, and Gurdon H. Smith, being present in open Court, and having heard the said verdict, are inquired of by the Court if they had
14 anything to say why the judgment of the law should not be pronounced upon them, according to said verdict; and no sufficient answer being given, His Honor, the Judge of the said Court, in the presence of the said defendants, does here adjudge and sentence, as follows:

That the said defendants, Weeds, Inc., and Gurdon H. Smith, for the said offenses of which they stand convicted as aforesaid, and as charged in the First Count of said Indictment, pay a fine of One Thousand Dollars;

That the said defendants, for the said offenses of which they stand convicted as aforesaid, and as charged in the Second Count of said Indictment, pay a fine of Five Thousand Dollars;

That the said defendants, for the said offenses of which they stand convicted as aforesaid, and as charged in the Third Count of said Indictment, pay a fine of Five Thousand Dollars;

That the said defendants, for the said offenses of which they stand convicted as aforesaid, and as charged in the Fourth Count of said Indictment, pay a fine of Five Thousand Dollars;

That the said defendants, for the said offenses of which they stand convicted as aforesaid, and as charged in the Fifth Count of said Indictment, pay a fine of Five Thousand Dollars;

That the said defendants, for the said offenses of which they stand convicted as aforesaid, and as charged in the Seventh Count of said Indictment, pay a fine of Five Thousand Dollars; and

That the said defendants, for the said offenses of which they stand convicted as aforesaid, and as charged in the Eighth Count of said Indictment, pay a fine of Five Thousand Dollars.

C. W. HIGGISON,
Clerk.

Endorsed: No. 2013. District Court of the United States, Northern District of New York. The United States of America vs. Weeds, Inc., and Gurdon H. Smith. Record of Conviction, April Term, 1920. Fine, $31,000.00. Filed May 28, 1920. C. W. Higgison, Clerk.

15 United States District Court for the Northern District of New York.

UNITED STATES OF AMERICA, Plaintiff,

vs.

WEED'S, INC., CHARLES A. WEED and GURDON H. SMITH, Defendants.

Demurrer to Indictment.

The defendants and each of them, permission of this Court having first been asked and obtained, withdraw their plea of not guilty heretofore interposed to the indictment herein, and demur to said indictment and each and all of the counts therein as follows:

First.

The defendants demur to the first count contained in said indictment upon the following grounds, namely:

1. Said indictment and said count are insufficient in form and substance in that the alleged facts and acts set forth and stated therein do not constitute a crime.

2. The alleged acts set forth and stated therein are not contrary to any statute of the United States or to any regulation made, or order issued by the President of the United States acting under the authority of any statute or law of the United States.

3. If the acts so alleged are contrary to or are prohibited by any statute or law of the United States or are contrary to any regulation made, or order issued by the president of the United States, then such statutes, laws, regulations or orders are and each of them is null, void and of no effect because the same are and each of them is in
16 contravention of the provisions of the Constitution of the United States, in that they deprive the defendants of the equal protection of the laws and deprive the defendants of their liberty and property without due process of law, all contrary to the provisions of Article V of the amendments to the Constitution of the United States.

4. If said alleged acts are contrary to or violative of any regulation made, or order issued by the President of the United States under any statute or law which provides or attempts to prescribe that the President of the United States may make regulations or issue orders fixing, creating or establishing prices, charges or profits which properly or lawfully may be made or charged by the defendants or others on the sale, handling or merchandising of clothing or any other commodity, then such regulation or order was and is illegal, null, void and of no effect, because in Law it would amount

to and constitute the exercise of legislative powers by the President of the United States in violation of the provision of Section 1 of Article I of the Constitution of the United States, which provides that all legislative powers shall be vested in Congress.

5. Said facts and acts so alleged are insufficient in form and substance to constitute and they do not constitute a crime or criminal offence because it does not appear therefrom, nor is there any allegation or statement therein showing or tending to show that the charge made or the price or prices fixed on the goods, merchandise or clothing therein referred to were unjust or unreasonable, nor in excess, above or beyond the fair market value of such goods, wares, merchandise or wearing apparel therein mentioned and described.

6. The facts and acts alleged therein do not constitute a crime or a criminal offence under the statute, because none of the
17 merchandise or wearing apparel mentioned therein was sold or disposed of or is alleged to have been sold or disposed of. The mere offering for sale of wearing apparel without any sale having actually been made is not an offence, and is not an act prohibited by any statute or law of the United States or of any regulation or order made or issued by the President of the United States.

7. The statute or law on which said indictment and said count are based, and which statute or law the defendants are therein charged with having violated had become and was null, void and of no effect at the period named in such indictment and count, because the state of war referred to therein had ceased to and did not then exist.

8. The statute on which said indictment and said count is based is null, void and of no effect because it is so general, speculative, uncertain and indefinite in its terms and provisions that it does not define or specify what facts or acts shall constitute a violation thereof or an offence thereunder and does not enable a person to determine, decide or know in advance what specific act or acts, thing or things are prohibited thereby or are permitted thereunder, but leaves it to be determined after the event or act, whether such event or act was or was not a violation thereof, thereby not only making it possible but inevitable that an act committed or thing done in one locality may be legal, innocent and valid, while the same act committed or thing done in another locality under like circumstances and at the same time, or even in the same locality and by the same person, will be held to be a criminal offence, all in violation of the provisions of Articles V and VI of the amendments of the Constitution of the United States.

18 Second.

The defendants demur to the second count contained in said indictment, upon the following grounds, namely:

1. Said indictment and said count are insufficient in form and substance in that the alleged facts and acts set forth and stated therein do not constitute a crime.

2. The alleged acts set forth and stated therein are not contrary to any statute of the United States or to any regulation made, or order issued by the President of the United States acting under the authority of any statute or law of the United States.

3. If the acts so alleged are contrary to or are prohibited by any statute or law of the United States or are contrary to any regulation made, or order issued by the President of the United States, then such statutes, laws, regulations or orders are and each of them is null, void and of no effect because the same are and each of them is in contravention of the provisions of the Constitution of the United States, in that they deprive the defendants of the equal protection of the laws and deprive the defendants of their liberty and property without due process of law, all contrary to the provisions of Article V of the amendments to the Constitution of the United States.

4. If said alleged acts are contrary to or violative of any regulation made, or order issued by the President of the United States under any statute or law which provides or attempts to prescribe that the President of the United States may make regulations or issue orders fixing, creating or establishing prices, charges or profits which properly or lawfully may be made or charged by the defendants or others on the sale, handling or merchandising of clothing or any other commodity, then such regulation or order was and is illegal, null, void and of no effect, because in Law it would amount to and constitute the exercise of legislative powers by the President of the United States in violation of the provision of Section 1 of Article I of the Constitution of the United States, which provides that all legislative powers shall be vested in Congress.

5. Said facts and acts so alleged are insufficient in form and substance to constitute and they do not constitute a crime or criminal offence because it does not appear therefrom, nor is there any allegation or statement therein showing or tending to show that the charge made or the price or prices fixed on the goods, merchandise or clothing therein referred to were unjust or unreasonable, nor in excess, above or beyond the fair market value of such goods, wares, merchandise or wearing apparel therein mentioned and described.

6. The statute or law on which said indictment and said count are based, and which statute or law the defendants are therein charged with having violated had become and was null, void and of no effect at the period named in such indictment and count, because the state of war referred to therein had ceased to and did not then exist.

7. The statute on which said indictment and said count is based is null, void and of no effect because it is so general, speculative, uncertain and indefinite in its terms and provisions that it does not

define or specify what facts or acts shall constitute a violation thereof or an offence thereunder and does not enable a person to determine, decide or know in advance what specific act or acts, thing or things are prohibited thereby or are permitted thereunder, but leaves it to be determined after the event or act, whether such event or act
20 was or was not a violation thereof, thereby not only making it possible but inevitable that an act committed or thing done in one locality may be legal, innocent and valid, while the same act committed or thing done in another locality under like circumstances and at the time or even in the same locality and by the same person, will be held to be a criminal offence, all in violation of the provisions of Articles V and VI of the amendments of the constitution of the United States.

Third.

The defendants demur to the third count contained in said indictment, upon the following grounds, namely:

1. Said indictment and said count are insufficient in form and substance in that the alleged facts and acts set forth and stated therein do not constitute a crime.

2. The alleged acts set forth and stated therein are not contrary to any statute of the United States or to any regulation made, or order issued by the President of the United States acting under the authority of any statute or law of the United States.

3. If the acts so alleged are contrary to or are prohibited by any statute or law of the United States or are contrary to any regulation made, or order issued by the President of the United States, then such statutes, laws, regulations or orders are and each of them is null, void and of no effect because the same are and each of them is in contravention of the provisions of the constitution of the United States, in that they deprive the defendants of the equal protection of the laws and deprive the defendants of their liberty and property without due process of law, all contrary to the provisions of
21 Article V of the amendments to the Constitution of the United States.

4. If said alleged acts are contrary to or violative of any regulation made, or order issued by the President of the United States under any statute or law which provides or attempts to prescribe that the President of the United States may make regulations or issue orders fixing, creating or establishing prices, charges or profits which properly or lawfully may be made or charged by the defendants or others on the sale, handling or merchandising of clothing or any other commodity, then such regulation or order was and is illegal, null, void and of no effect, because in law it would amount to and constitute the exercise of legislative powers by the President of the United States in violation of the provision of Section 1 of Article I of the Constitution of the United States, which provides that all legislative powers shall be vested in Congress.

5. Said facts and acts so alleged are insufficient in form and substance to constitute and they do not constitute a crime or criminal offence because it does not appear therefrom, nor is there any allegation or statement therein showing or tending to show that the charge made or the price or prices fixed on the goods, merchandise or clothing therein referred to were unjust or unreasonable, nor in excess, above or beyond the fair market value of such goods, wares, merchandise or wearing apparel therein mentioned and described.

6. The statute or law on which said indictment and said count are based, and which statute or law the defendants are therein charged with having violated had become and is null, void and of no effect at the period named in such indictment and count, because the state of war referred to therein had ceased to and did not then exist.

22 7. The statute on which said indictment and said Count is based is null, void and of no effect because it is so general, speculative, uncertain and indefinite in its terms and provisions that it does not define or specify what facts or acts shall constitute a violation thereof or an offence thereunder and does not enable a person to determine, decide or know in advance what specific act or acts, thing or things are prohibited thereby or are permitted thereunder, but leaves it to be determined after the event or act, whether such event or act was or was not a violation thereof thereby not only making it possible but inevitable that an act committed or thing done in one locality may be legal, innocent and valid, while the same act committed or thing done in another locality under like circumstances and at the same time, or even in the same locality and by the same person, will be held to be a criminal offense, all in violation of the provisions of Articles V and VI of the amendments of the Constitution of the United States.

Fourth.

The defendants demur to the fourth count contained in said Indictment, upon the following grounds, namely:

1. Said indictment and said count are insufficient in form and substance in that the alleged facts and acts set forth and stated therein do not constitute a crime.

2. The alleged acts set forth and stated therein are not contrary to any statute of the United States or to any regulation made, or order issued by the President of the United States acting under the authority of any statute or law of the United States.

23 3. If the acts so alleged are contrary to or are prohibited by any statute or law of the United States or are contrary to any regulation made, or order issued by the president of the United States, then such statutes, laws, regulations or orders are and each of them is null, void and of no effect because the same are and each of them is in contravention of the provisions of the constitution of

the United States, in that they deprive the defendants of the equal protection of the laws and deprive the defendants of their liberty and property without due process of law, all contrary to the provisions of Article V of the amendments to the Constitution of the United States.

4. If said alleged acts are contrary to or violative of any regulation made, or order issued by the President of the United States under any statute or law which provides or attempts to prescribe that the President of the United States may make regulations or issue orders fixing, creating or establishing prices, charges or profits which properly or lawfully may be made or charged by the defendants or others on the sale, handling or merchandising of clothing or any other commodity, then such regulation or order was and is illegal, null, void and of no effect because in Law it would amount to and constitute the exercise of legislative powers by the President of the United States in violation of the provision of Section 1 of Article I of the Constitution of the United States, which provides that all legislative powers shall be vested in Congress.

5. Said facts and acts so alleged are insufficient in form and substance to constitute and they do not constitute a crime or criminal offence because it does not appear therefrom, nor is there any allegation or statement therein showing or tending to show that the charge made or the price or prices fixed on the goods, merchandise
24 or clothing therein referred to were unjust or unreasonable, nor in excess, above or beyond the fair market value of such goods, wares, merchandise or wearing apparel therein mentioned and described.

6. The statute or law on which said indictment and said count are based, and which statute or law the defendants are therein charged with having violated had become and was null, void and of no effect at the period named in such indictment and count, because the state of war referred to therein had ceased to and did not then exist.

7. The statute on which said indictment and said count is based is null, void and of no effect because it is so general, speculative, uncertain and indefinite in its terms and provisions that it does not define or specify what facts or acts shall constitute a violation thereof or an offence thereunder and does not enable a person to determine, decide or know in advance what specific act or acts, thing or things are prohibited thereby or are permitted thereunder, but leaves it to be determined after the event or act, whether such event or act was or was not a violation thereof, thereby not only making it possible but inevitable that an act committed or thing done in one locality may be legal, innocent and valid, while the same act committed or thing done in another locality under like circumstances and at the same time, or even in the same locality and by the same person, will be held to be a criminal offence, all in violation of the provisions of Articles V and VI of the amendments of the Constitution of the United States.

25

Fifth.

The defendants demur to the fifth count contained in said indictment, upon the following grounds, namely:

1. Said indictment and said count are insufficient in form and substance in that the alleged facts and acts set forth and stated therein do not constitute a crime.

2. The alleged acts set forth and stated therein are not contrary to any statute of the United States or to any regulation made, or order issued by the President of the United States acting under the authority of any statute or law of the United States.

3. If the acts so alleged are contrary to or are prohibited by any statute or law of the United States or are contrary to any regulation made, or order issued by the president of the United States, then such statutes, laws, regulations or orders are and each of them is null, void and of no effect because the same are and each of them is in contravention of the provisions of the constitution of the United States, in that they deprive the defendants of the equal protection of the laws and deprive the defendants of their liberty and property without due process of law, all contrary to the provisions of Article V of the amendments to the Constitution of the United States.

4. If said alleged acts are contrary to or violative of any regulation made, or order issued by the president of the United States under any statute or law which provides or attempts to prescribe that the President of the United States may make regulations or issue orders fixing, creating or establishing prices, charges or profits which properly or lawfully may be made or charged by the defend-

26 ants or others on the sale, handling or merchandising of clothing or any other commodity, then such regulation or order was and is illegal, null, void and of no effect, because in Law it would amount to and constitute the exercise of legislative powers by the President of the United States in violation of the provision of Section 1 of Article I of the Constitution of the United States, which provides that all legislative powers shall be vested in Congress.

5. Said facts and acts so alleged are insufficient in form and substance to constitute and they do not constitute a crime or criminal offence because it does not appear therefrom, nor is there any allegation or statement therein showing or tending to show that the charge made or the price or prices fixed on the goods, merchandise or clothing therein referred to were unjust or unreasonable, nor in excess, above or beyond the fair market value of such goods, wares, merchandise or wearing apparel therein mentioned and described.

6. The statute or law on which said indictment and said count are based, and which statute or law the defendants are therein charged with having violated had become and was null, void and of no ef-

fect at the period named in such indictment and count, because the state of war referred to therein had ceased to and did not exist.

7. The statute on which said indictment and said count is based is null, void and of no effect because it is so general, speculative, uncertain and indefinite in its terms and provisions that it does not define or specify what facts or acts shall constitute a violation thereof or an offence thereunder and does not enable a person to determine, decide or know in advance what specific act or acts, thing or things are prohibited thereby or are permitted thereunder, but leaves
27 it to be determined after the event or act, whether such event or act was or was not a violation thereof, thereby not only making it possible but inevitable that an act committed or thing done in one locality may be legal, innocent and valid, while the same act committed or thing done in another locality under like circumstances and at the same time, or even in the same locality and by the same person, will be held to be a criminal offence, all in violation of the provisions of Articles V and VI of the amendments of the Constitution of the United States.

Sixth.

The defendants demur to the sixth count contained in said indictment, upon the following grounds, namely:

1. Said indictment and said count are insufficient in form and substance in that the alleged facts and acts set forth and stated therein do not constitute a crime.

2. The alleged acts set forth and stated therein are not contrary to any statute of the United States or to any regulation made, or order issued by the President of the United States acting under the authority of any statute or law of the United States.

3. If the acts so alleged are contrary to or are prohibited by any statute or law of the United States or are contrary to any regulation made, or order issued by the President of the United States, then such statutes, laws, regulations or orders are and each of them is null, void and of no effect because the same are and each of them is in contravention of the provisions of the constitution of the United States, in that they deprive the defendants of the equal protection of the laws and deprive the defendants of their liberty and property without due process of law, all contrary to the provisions of
28 Article V of the amendments to the Constitution of the United States.

4. If said alleged acts are contrary to or violative of any regulations made, or order issued by the President of the United States under any statute or law which provides or attempts to prescribe that the President of the United States may make regulations or issue orders fixing, creating or establishing prices, charges or profits which properly or lawfully may be made or charged by the defendants or others on the sale, handling or merchandising of clothing or any other

commodity, then such regulation or order was and is illegal, null void and of no effect, because in Law it would amount to and constitute the exercise of legislative powers by the President of the United States in violation of the provision of Section 1 of Article I of the Constitution of the United States, which provides that all legislative powers shall be vested in Congress.

5. Said facts and acts so alleged are insufficient in form and substance to constitute and they do not constitute a crime or criminal offence because it does not appear therefrom, nor is there any allegation or statement therein showing or tending to show that the charge made or the price or prices fixed on the goods, merchandise or clothing therein referred to were unjust or unreasonable, nor in excess, above or beyond the fair market value of such goods, wares, merchandise or wearing apparel therein mentioned and described.

6. The statute or law on which said indictment and said count are based, and which statute or law the defendants are therein charged with having violated had become and was null, void and of no effect at the period named in such indictment and
29 count, because the state of war referred to therein had ceased to and did not then exist.

7. The statute on which said indictment and said count is based is null, void and of no effect because it is so general speculative, uncertain and indefinite in its terms and provisions that it does not define or specify what facts or acts shall constitute a violation thereof or an offence thereunder and does not enable a person to determine, decide or know in advance what specific act or acts, thing or things are prohibited thereby or are permitted thereunder, but leaves it to be determined after the event or act, whether such event or act was or was not a violation thereof, thereby not only making it possible but inevitable that an act committed or thing done in one locality may be legal, innocent and valid, while the same act committed or thing done in another locality under like circumstances and at the same time, or even in the same locality and by the same person, will be held to be a criminal offence, all in violation of the provisions of Articles V and VI of the amendments of the Constitution of the United States.

Seventh.

The defendants demur to the seventh count contained in said indictment, upon the following grounds, namely:

1. Said indictment and said count are insufficient in form and substance in that the alleged facts and acts set forth and stated therein do not constitute a crime.

2. The alleged acts set forth and stated therein are not contrary to any statute of the United States or to any regulation made, or order issued by the President of the United States acting un-
30 der the authority of any statute or law of the United States.

3. If the acts so alleged are contrary to or are prohibited by any statute or law of the United States or are contrary to any regulation made, or order issued by the President of the United States then such statutes, laws regulations or orders are and each of them is null, void and of no effect because the same are and each of them is in contravention of the provisions of the Constitution of the United States, in that they deprive the defendants of the equal protection of the laws and deprive the defendants of their liberty and property without due process of law, all contrary to the provisions of Article V of the amendments to the Constitution of the United States.

4. If said alleged acts are contrary to or violative of any regulation made, or order issued by the President of the United States under any statute or law which provides or attempts to prescribe that the President of the United States may make regulations or issue orders fixing, creating or establishing prices, charges or profits which properly or lawfully may be made or charged by the defendants or others on the sale, handling or merchandising of clothing or any other commodity, then such regulation or order was and is illegal, null, void and of no effect because in Law it would amount to and constitute the exercise of legislative powers by the President of the United States in violation of the provision of Section 1 of Article I of the Constitution of the United States, which provides that all legislative powers shall be vested in Congress.

5. Said facts and acts so alleged are insufficient in form and substance to constitute and they do not constitute a crime or criminal offence because it does not appear therefrom, nor is there any allegation or statement therein showing or tending to show that the
31 charge made or the price or prices fixed on the goods, merchandise or clothing therein referred to were unjust or unreasonable, nor in excess, above or beyond the fair market value of such goods, wares, merchandise or wearing apparel therein mentioned and described.

6. The statute or law on which said indictment and said count are based, and which statute or law the defendants are therein charged with having violated had become and was null, void and of no effect at the period named in such indictment and count, because the state of war referred to therein had ceased to and did not then exist.

7. The statute on which said indictment and said count is based is null, void and of no effect because it is so general, speculative, uncertain and indefinite in its terms and provisions that it does not define or specify what facts or acts shall constitute a violation thereof or an offence thereunder and does not enable a person to determine, decide or know in advance what specific act or acts, thing or things are prohibited thereby or are permitted thereunder, but leaves it to be determined after the event or act, whether such event or act was or was not a violation thereof, thereby not only making it possible

but inevitable that an act committed or thing done in one locality may be legal, innocent and valid, while the same act committed or thing done in another locality under like circumstances and at the same time, or even in the same locality and by the same person, will be held to be a criminal offence, all in violation of the provisions of Articles V and VI of the amendments of the Constitution of the United States.

32

Eighth.

The defendants demur to the eighth count contained in said indictment, upon the following grounds, namely:

1. Said indictment and said count are insufficient in form and substance in that the alleged facts and acts set forth and stated therein do not constitute a crime.

2. The alleged acts set forth and stated therein are not contrary to any statute of the United States or to any regulation made, or order issued by the President of the United States acting under the authority of any statute or law of the United States.

3. If the acts so alleged are contrary to or are prohibited by any statute or law of the United States or are contrary to any regulation made, or order issued by the President of the United States, then such statutes, laws, regulations or orders are and each of them is null, void and of no effect because the same are and each of them is in contravention of the provisions of the constitution of the United States, in that they deprive the defendants of the equal protection of the laws and deprive the defendants of their liberty and property without due process of law, all contrary to the provisions of Article V of the amendments to the Constitution of the United States.

4. If said alleged acts are contrary to or violative of any regulation made, or order issued by the President of the United States under any statute or law which provides or attempts to prescribe that the President of the United States may make regulations or issue orders fixing, creating or establishing prices, charges or profits which properly or lawfully may be made or charged by the defendants or others on the sale, handling or merchandising of clothing or any other commodity, then such regulation or order was and is illegal, null, void and of no effect, because in law it
33 would amount to and constitute the exercise of legislative powers by the President of the United States in violation of the provision of Section I of Article I of the Constitution of the United States, which provides that all legislative powers shall be vested in Congress.

5. Said facts and acts so alleged are insufficient in form and substance to constitute and they do not constitute a crime or criminal offence because it does not appear therefrom, nor is there any allegation or statement therein showing or tending to show that the charge made or the price or prices fixed on the goods, mer-

chandise or clothing therein referred to were unjust or unreasonable, nor in excess, above or beyond the fair market value of such goods, wares, merchandise or wearing apparel therein mentioned and described.

6. The statute or law on which said indictment and said count are based, and which statute or law the defendants are therein charged with having violated had become and was null, void and of no effect at the period named in such indictment and count, because the state of war referred to therein had ceased to and did not then exist.

7. The statute on which said indictment and said count is based is null, void and of no effect because it is so general, speculative, uncertain and indefinite in its terms and provisions that it does not define or specify what facts or acts shall constitute a violation thereof or an offense thereunder and does not enable a person to determine, decide or know in advance what specific act or acts, thing or things are prohibited thereby or are permitted thereunder, but leaves it to be determined after the event or act, whether such event or act was or was not a violation thereof, thereby not only making it possible but inevitable that an act committed or thing
34 done in one locality may be legal, innocent and valid, while the same act committed or thing done in another locality under like circumstances and at the time or even in the same locality and by the same person, will be held to be a criminal offence, all in violation of the provisions of Articles V and VI of the Amendments of the Constitution of the United States.

Wherefore the defendants and each of them respectfully ask that this demurrer be sustained and that said indictment and each of the counts in said indictment as well as said indictment be dismissed, set aside and quashed.

HINMAN, HOWARD & KATTELL,
Attorneys and Solicitors for the Defendants, Security Mutual Life Building, Binghamton, N. Y.

STATE OF NEW YORK,
County of Broome, ss:

Harvey D. Hinman being duly sworn says he is an attorney at law duly admitted to practice as attorney and solicitor in the United States District Court for the Northern District of New York, and is one of the attorneys and solicitors for defendants herein; that he has read the foregoing demurrer and knows the contents thereof; that said demurrer is interposed in good faith and not for the purpose of delay; that he believes it is valid, good, sufficient and well founded in law.

HARVEY D. HINMAN.

Subscribed and sworn to before me this 30th day of April, 1920.

Z. BENNETT PHELPS,
Notary Public.

[Notarial Seal.]

Indorsed: Demurrer to Indictment. Filed May 3, 1920. C. W. Higgison, Clerk.

35 In the District Court of the United States for the Northern District of New York.

THE UNITED STATES OF AMERICA, Plaintiff,

vs.

WEEDS, INC., and GURDON H. SMITH, Defendants.

Bill of Exceptions.

This was a criminal action upon an indictment against the defendants above named and also against Charles A. Weed, containing eight (8) Counts for alleged violations of the so called Lever Law.

The case came on for trial on the twenty-fifth day of May, 1920, at Syracuse, N. Y., before Hon. Martin T. Manton, United States Circuit Judge; Hon. Dennis B. Lucey, United States District Attorney, and Frank J. Cregg, Assistant United States District Attorney, appearing as Counsel for the plaintiff, and Harvey D. Hinman, Esq., and Frank S. Coburn, Esq., appearing as counsel for the defendants.

The defendants having filed a written demurrer to the indictment and each of the several counts thereof, which demurrer having been overruled, the defendants excepted to the order of the Court overruling said demurrer.

Thereupon Counsel for the defendants moved in their behalf to dismiss the first Count of the indictment on each and all of the grounds stated in the demurrer of the defendants, filed herein, and also on the additional ground that the indictment does not charge that the acts therein complained of were committed wilfully or intentionally; also on the further ground that the Act itself,

36 the so-called Lever Act, makes provision for a proclamation by the President of orders to carry the Act into effect, and that the President having issued orders and proclamations fixing what is a reasonable and just profit or price or charge in dealing with or handling foods, feeds and fuel and not having made any such order or regulation concerning clothing, such first Count does not state a criminal offense, and also on the further ground that said first Count of the indictment does not charge that the articles therein mentioned were sold at an unjust or unreasonable price or charge, but merely that they were marked for sale.

The Court thereupon denied said motion and overruled said objections, to which rulings the defendants excepted.

Thereupon, defendants' Counsel moved to dismiss all and each of

the Counts of the indictment on the same grounds. The Court denied each of said motions and the defendants excepted thereto.

Thereupon the indictment was moved for trial against the defendants, Weeds, Inc., and Gurdon H. Smith, but not against the defendant, Charles A. Weed.

A jury having been impanelled, the following proceedings were had and testimony taken:

An opening statement to the jury was made by Mr. Cregg in behalf of the United States and by Mr. Hinman in behalf of the defendants. Certified copy of Articles of Incorporation of defendant received in evidence, Exhibit 1.

Thereupon JAMES P. DOLAN being called as a witness and being sworn, testified as follows:

I am an Agent of the Department of Justice. In my official capacity I visited the store of the defendant corporation at Binghamton on March 11, 1920. I then saw Mr. C. A. Weed, the President of the corporation, I told him I was the Special Agent of the
37 Department of Justice and I came to check up the cost and selling price of various articles in his store for the purpose of ascertaining whether he was exacting an exorbitant profit under the Lever Act and he referred me to Miss Carey, a young lady bookkeeper. She brought me from one clerk to another and gave me the cost and selling price of certain articles in that store. She stated $7.25 was the cost price of the boy's suit numbered A 900-12¾. It was marked for sale at $12.75. The cost price was marked in code, the selling price in plain figures.

Wash suits, B 225875, were marked, cost price $4.16, marked for sale $8.75.

Wash suits, B 225675, cost price $3.45, marked for sale $6.75.

Item B 225275, cost price $1.10, marked for sale $2.75.

Hosiery, B 1350, cost price $2.02, marked for sale $3.50.

Item D 1850, cost price $4.67, marked for sale $8.50.

Item E 23½, knit goods, cost price $1.40, selling price $3.50.

Item knit goods, E 24, cost price $1.36, marked selling price $4.00.

Union suits, C 8-6, cost price $3.61½, selling price $6.00.

Shirts, S 72, cost price $1.00, marked selling price $2.00.

S 2165, cost price $1.12½, marked selling price $1.65.

Here the Court's attention was called to the fact that the witness was reading from a typewritten document. The witness then stated that he made a memorandum at the time and was testifying from a copy which he knew to be correct. Being advised by the Court to go on, the witness then testified:

Shirt number 15 was marked, cost price $3.00, marked for sale $5.00.

38 11-5, cost price $2.87½, marked selling price $5.00.

9-3, cost price $1.87½, marked selling price $3.00.

Silk shirts, 610, cost price $6.00, marked selling price $10.00.

112, cost price $7.00, marked selling price $12.00.

Z 1-18, hats, cost price $10.25, marked selling price $18.00.
B 4, cost price $6.50, marked selling price $12.00.
A 1, cost price $6.00 marked selling price $10.00.
W 11, cap, cost price $.37½, marked selling price $1.00.
Men's suits, 36360, cost price $30.50, marked selling price $60.00.

Here the witness was asked how Item 4760 was marked. He answered I have got 40760; whereupon defendants' Counsel objected because the indictment shows that it is 4760 and the witness states he has not that number but has a different number. It is not within the charge.

Counsel for plaintiff then stated—I offer to show that it is the same article sold at the same price. Thereupon the Court overruled the objection, to which the defendants excepted. The witness then proceeded as follows:

It is a brown color, the Munroe clothes, the cost price $37.50, marked selling price $60.00. The mark of identification is 40760.

The next article, men's suit, 32375, was marked cost price $40.00, marked selling price $75.00.

Overcoat, 31550, cost price $22.05, marked selling price $50.00.

The next item, 31875, overcoat, cost price $31.66, marked selling price $75.00.

The auditor down there stated that the capital stock of the corporation was $148,000.00 paid in full. The dimensions of the store, I should say, were approximately forty to fifty feet
39 by possibly one hundred feet deep, four stories high. I got some figures of the actual sales furnished by a young lady by the name of McCarthy that had charge of the entire cost system.

Thereupon being cross-examined by Counsel for the defendants, the witness testified as follows:

When I visited this store I had no figures or facts with which to compare the figures that I obtained there. The store was in disorder because they were making a lot of repairs. I saw some of Weed's advertisements in the newspapers. They advertised something about sales at alteration prices. I do not recall having seen placards marked "Alteration sales" or "Half price sales." The figures I have got were marked on the tags. Mr. Weed told Miss Carey to furnish me with whatever information I asked for. As I went through the store I made no memorandum. Mr. Boyd, a Special Agent of the Government, went through the store with me and wrote down on slips of paper the information then obtained. That day I was in the store approximately two hours or two hours and a half. I do not know where the newspaper advertisement that I had is. The name of the man who told me that the paid up capital stock of the concern was $148,000.00 was Mr. Hein. He told me that he was employed there temporarily and that the regular book-keeper,—a young woman, had recently died. Mr. Hein told me what the total capital invested in the business was—the amount of money that was invested in the stock of merchandise and fixtures. I wrote down those figures myself. The entire stock was $159,736.00. He told me the cost of the stock of merchandise;—and the fixtures were $11,333.00. He told me that they had out on account $32,943.23 and notes

receivable $24.89. That is all. I haven't the total of those items here. He also gave me the gross profits for expenses and so on the preceding year, 1919. I have not the total cash sales from the store for the year 1919. The gross profit was $105,262.89. Those
40 figures were furnished by Mr. Hein. As to those figures, I am testifying from a memorandum, which is not in my handwriting. Whether those figures are correct or not I could not testify from my own knowledge. I have been engaged in the mercantile business. Many years ago I was a cigar manufacturer. I have never been in the clothing business nor served in any capacity in that kind of business or had any experience in the business. While I was there in Weed's store I did not see any of the goods mentioned in the first item in the schedule in Count one of the indictment offered to any customer at $12.75, and I saw none sold that day for that price. The second item, B 225,875, were boys' wash suits. Those are summer season suits. I do not know what the experience of stores is as to the soiling of those goods when a lot is put on sale or as to what the custom may be concerning a profit on that class of goods. As to the fifth item, B 1350, hosiery, I am relying now upon the typewritten memorandum I hold in my hand rather than my recollection. That is a copy of the memorandum that was made by Mr. Boyd in the store at that time. I do not recall having been told that the letter B was used to distinguish wash suits. All of the items of wash suits that appear in Count one of the indictment are designated by a number beginning with the letter B. The first letter of the number of the next item of hosiery below looks as if it was a B and had been changed to a D. I will not testify that the letter D 1350 and the letter D 1850 do not apply to separate lots of sweaters, I do not know, I do not recall. I cannot testify that there was not a letter S prefixed to each number used to designate shirts. The original pencil memorandum does not show it. The pencil memorandum shows that B 4 and A 1 were distinguishing numbers of lots of hats. Aside from the pencil memorandum, I have no recollection
41 about it. The item, W 11, refers to a cap. Aside from the memorandum, I do not recollect that item. I do not remember how many caps there were in the lot or anything about it. I made an investigation in Binghamton of Fowler, Dick & Walker, Sisson Bros., Warner's Fur House, Hills, McLean & Haskins and the Milward Store, possibly some more that I don't recall.

Q. Did you examine any other clothing store in Binghamton on that occasion or on any other occasions?

To this question objection was made by Counsel for the plaintiff and sustained to which the defendants duly excepted.

I always took the proprietor's word for his overhead charges. Nobody gave me any figures as to the cost of doing business. My instructions when sent to Binghamton and under which I made this investigation, were to ascertain and report the cost price of articles and the marked price where they were marked and selling price where there had been actual sales. That is what I did.

Thereupon the Court inquired of the witness as follows—

Q. You had some figures there about the cost of doing business, didn't you? To this question, the witness answered—Not in this particular case. No Your Honor I have not.

Thereupon NELSON BOYD being called as a witness in behalf of the plaintiff and being duly sworn and examined by Counsel for the plaintiff, testified as follows—

I am an Agent of the Department. I was with Mr. Dolan in Weed's store in Binghamton on March eleventh last and assisted him in making the investigation. I took down the figures on that day. We saw Mr. Weed and told him we were agents of the Department of Justice and we were there to look over his prices and his cost marks. He referred us to a young lady, Miss Carey, who took us through the store. He said that she would introduce us to the clerks and would give us whatever information we asked for. She took us through the store. Mr. Dolan read off the marked selling prices. The clerk of the department gave us the cost
42 price of the articles. The cost price was marked in code on the articles. The cost price of the article, boy's suit, A 900-12¾, was $7.25, marked for sale at $12.75. Mr. Dolan asked the clerk if that was the selling price and the clerk said it was. The cost price of the next item, B 225,875, wash suits, as told by the clerk, was $4.16 and the marked for sale price was $8.75.

The next item, B 225,675, cost price $3.45, selling price $6.75.

The next item, wash suit, B 225,275, cost price $1.10, selling price $2.75.

Thereupon defendants' counsel moved to strike out the last answer of the witness on the ground that it was incompetent and a conclusion which motion was denied, to which ruling defendants duly excepted.

The next item, hosiery, B 1350, cost price $2.02, marked for sale price $3.50.

The next item, B 1850, cost price $4.67, marked for sale price $8.50.

The next item, knit goods, E 23½, cost price $1.40, selling price $3.50.

The next item, E 24, cost price $1.36, marked to sell $4.00.

The next item, union suits, C 8-6, cost price $3.62½, marked to sell for $6.00.

The next item, C 6-6, cost price $3.39, marked to sell for $6.00.

The next item, S 72, shirts, cost price $1.00, marked to sell for $2.00.

The next item, S 2165, cost price $1.12½, marked to sell for $1.65.

The next item, 15, should be S 15, cost price $3.00, marked to sell for $5.00.

43 The next item, I have 11-5, I have nothing indicating whether there should be a letter preceding it or not. The cost price of that item is $2.87½, marked to sell for $5.00.

The next item, 9-3 cost price $1.87½, marked to sell for $3.00.
The next item, silk shirt, 610, cost price $6.00, marked to sell for $10.00.
The next item, 112, cost price $7.00, marked to sell for $12.00.
Hat, Z 1-18, cost price $10.25, marked to sell for $18.00.
The next item, B 4, cost price $6.50, marked to sell for $12.00.
The next item, A 1, cost price $6.00, marked to sell for $10.00.
The next item, W 11, cost price $.37½, marked for sale $1.00.
The next item, men's suits, 36360, cost price $30.50, marked to sell for $60.00.
The next item, 40760, cost price $37.50, marked to sell for $60.00.
The next item, 32375, cost price $40.00, marked to sell for $75.00.
Overcoat, 31550, cost price $22.05, marked to sell for $50.00.
The next item, overcoat, 31875, cost price $31.66, marked to sell for $75.00.

Thereupon being cross-examined by Counsel for the defendants, the witness testified—

According to my memorandum I first had the item, hosiery, B 1350 and changed it to D 1350. My memorandum shows that the distinguishing marks of shirts began with the letter S. I
44 marked the first three or four lots beginning with the letter S and with ditto marks for three or four items and then without any letter. I do not recollect as to whether those distinguishing marks should all begin with the letter S or not. Z was not the letter used in connection with numbers to distinguish hats, I am sure of that. As far as I can recollect, a letter began the distinguishing mark of each lot of goods I saw there in the store, excepting clothing. The cost prices of the articles that I saw in the store were marked in code letters on tags attached to the articles. The price mark for sale was written in figures on the back. We did not have to ask the clerks for those selling marks but we did in every instance. I couldn't tell you the names of the clerks who gave us those marked prices. We took the marked prices from the tags first and asked the clerk if that was the selling price. The clerk was right with us, followed right along with us. All we asked was "Is that the correct marked price"? In each instance we asked the clerk that and the clerk answered in the affirmative, so far as I can remember it. I don't know the names of any of the clerks. I took the names of Miss Carey, the book-keeper, Miss McCarthy and Mr. Hein. Miss McCarthy had charge of the cost system. She gave me the cost on the actual sales. I mean the sales mentioned in Counts two to eight, inclusive, of the indictment, the actual sales. Her system shows the cost and selling prices of the articles mentioned in the first Count of the indictment. I did not look at her system so as to ascertain what the cost of the articles was. Miss McCarthy exhibited to Mr. Dolan and myself there that day the system of keeping those records and explained it to Mr. Dolan and to me. I didn't pay much attention. Each clerk had the cost marked in his department and could read that designation. I did not ask any of those clerks what they had been actually selling

any of the articles mentioned in the first Count of the indict-
45 ment for during the past week. I simply asked them what the cost of each article was and then took the selling price as it appears on the tags or as they told me. On that day I limited my inquiries there to ascertaining the various costs of the various articles I examined in the store and their marked price or selling price.

Thereupon DAVID F. BRODERICK being called as a witness for the plaintiff and being duly sworn and examined by Counsel for the plaintiff, testified as follows—

I am an Agent of the Department of Justice. I went to Binghamton about April 3, 1920, to visit the store of Weed and Company. I inquired for the Manager and was introduced to Mr. Gurdon H. Smith as the manager. I told Mr. Smith I wanted to check up some of the work that had been done—the investigation that had been done in his store by Mr. Boyd and Mr. Dolan, agents of our Department, and I told him that I wanted to verify some actual sales and look at his invoices and sales slips and he took me to the office personally and turned me over to Miss McCarthy who had charge of their system of costs. I explained to her that I would like to see certain sales tickets for certain specified dates. Some of the information had been originally furnished to me by the reports of Mr. Boyd or Mr. Dolan and I asked for those tickets in addition to others and they were turned over to me. Mr. Smith was present during all this period and when I got those slips I made copies of them. Each slip bore the customer's name, the article, the stock number, the selling price and the cost price had been added to each ticket in figures, not in code. Mr. Smith told me that he was the general manager of the store. Miss McCarthy produced the sales slip of the item mentioned in the second Count of the indictment, man's suit number 38040. I made a duplicate of the sales slip, veri-
fied by Miss McCarthy. The sales slip shows the cost price
46 of the article, the price at which it was sold for, the date of the sale and the cost price in figures. The cost price was $20.00. It was sold for $40.00 on January 8, 1920, to J. H. Nelson of 43 Main Street. I saw the original sales ticket of the item mentioned in Count three of the indictment, number 20040, a man's suit, that was given me by Miss McCarthy in Mr. Smith's presence. The cost price of that article as marked on the ticket was $12.10. It sold for $40.00 on January 9, 1920.

Thereupon the witness was asked this question—

Q. What was said at that time by anyone as to whether or not the figures on that ticket represented the actual cost and selling price?

To which question defendants objected. The Court overruled the objections and defendants duly excepted. The witness answered—

A. Collectively referring to all, these sales tickets were correct and she informed me that they were.

Thereupon the witness was asked—

Q. That they represented the correct cost price and the correct selling price?

To which the witness answered—

A. Yes, sir.

Thereupon defendants' counsel moved to strike out the answer on the ground that it was incompetent and a conclusion, which motion was denied, to which defendants duly excepted.

The item mentioned in the fourth Count of the indictment, man's suit, number 38945, appears on the same sales ticket as number 20040. The cost price of that article was $23.50. It was sold January 9, 1920, for $45.00 to S. J. Nunn.

Article 20040 also was sold to S. J. Nunn. Three items appear on that ticket.

I had the sales ticket for the article mentioned in Count
47 five of the indictment, 22050, a man's suit. The cost price was $17.82. It was sold for $44.50 on January 31, 1920, to B. Pender. Count Six of the indictment was dismissed by the Court. The cost price of the article mentioned in Count seven of the indictment, one suit number 30535, was $11.78; that article was sold January 29, 1920, for $29.50 to A. M. Pierson, 149 Susquehanna Street. The suit mentioned in the eighth Count of the indictment, number 35960, cost $32.25 and was sold on March 3, 1920, for $60.00 to T. B. Crary, 315 Main Street, Binghamton. This information I got from Miss McCarthy and it was taken from the actual sales slips of the garments at the time. Both the cost prices as well as the prices at which the articles were sold were on the slips.

Thereupon being cross-examined by Counsel for the defendants, the witness testified as follows—

The memorandum on Exhibit 2 is in my handwriting. It was made at the time of my visits to the Weed store on April 3rd, 1920. When I told Mr. Smith that I wanted to check up some data that I had I did not have the data with me with reference to the items that appear in Count One of the indictment at the time of the investigation. I had it but did not have it with me at the store. I made no check of those items. The records I took are in Counts two to eight, inclusive, of the indictment. I do not recall that I made any inquiry there at the store in connection with the sales ticket of January 8, 1920, of the sale to J. H. Nelson of the suit mentioned in the second Count of the indictment as to when that suit was purchased. I tried to verify when the particular items checked by me and covered by Counts two to eight of the indictment were received by the store but Miss McCarthy couldn't seem to find certain cards in her card case which would give her that information. I made no
48 inquiries there that day as to what was the price at which other suits in that lot number 38048, shown on this sales slip, had been sold since January 8, 1920. I understood that a lot

number might cover more suits than one. Witness hands Counsel sales slips for the articles covered by Counts 3 and 4 of the indictment marked Exhibits 3 and 4 for Identification.

Thereupon plaintiff's Counsel offered Exhibits 3 and 4 in evidence and they were received.

When I asked Miss McCarthy for a copy of her sales tickets she produced them and handed them to me for copying. The sale on January 9, 1920, to S. J. Nunn, covered by the third Count of the indictment, there are three items. The figure 7 on that sales ticket opposite the words "sold by" was the number of the clerk who made that sale. I knew from this slip when I saw it that on January 9, 1920, Weeds' store sold to S. J. Nunn three suits. I did not examine any merchandise or stock at all. I confined my inquiries to the sales slips and to what information I got from Miss McCarthy. I reported to the Department of Justice the three items which appeared on the sales slip on which the item mentioned in Count three of the indictment appeared. Something was said to me about lots of clothing called transfer lots. I do not recall just what Miss McCarthy said about that; transfer lot was the way she explained.

Defendants' Counsel thereupon moved to strike out the testimony as to the sale mentioned in Count five of the indictment, upon the ground that the indictment charges the making of the sale on January 21, 1920, while the evidence establishes a sale made on January thirty-first.

The Court denied the motion, to which the defendants excepted.

Thereupon the plaintiff rested its case.

Thereupon Counsel for the defendants moved to dismiss the
49 first Count of the indictment, upon the grounds—

First. That the facts proved do not constitute the offense charged;

Second. That the Government had failed to establish the offense charged by competent and proper evidence, or by sufficient evidence;

Third. On each and all of the grounds stated in the defendants' demurrer;

Fourth. On each of the grounds stated in the defendants' motion to dismiss at the opening of the trial.

The Court denied the motion, to which ruling of the Court Counsel for the defendants then and there excepted.

Thereupon Defendants' Counsel made like motions to dismiss each of the other Counts of the indictment upon the same grounds.

The Court denied each of said motions, to which rulings of the Court Counsel for the defendants then and there duly excepted.

50 Thereupon EULETA McCARTHY called as a witness in behalf of the defendants, being duly sworn and examined by Counsel for the defendants, testified as follows:

I am employed by Weeds, Incorporated, as cost clerk and was employed in the store during the months of February, March and April of this year. I was there on the occasion when some Government Inspectors visited the store. The first time they came was about the tenth or eleventh of March, or the latter part of February. I learned the name of only one. His name was Mr. Dolan. They talked with me. They were there the greater part of my afternoon. They were calling lots to me in order to get the cost on them. I had charge of the cards and records that gave the costs of the articles. I gave them all the information they asked for. I saw them going around in different parts of my floor—second floor—examining different lots of goods. Describing, in a few words the system of keeping records of costs of goods and marks on them, it is the Weed system on the Rand cards: As the goods come in I put a lot number on them, a red lot, usually three numbers with the selling price the last two; after that I put the cost mark in code and the article itself—if it is a suit—from whom it is bought and then the lot: Each day's sales I check off from these sales, the cards or sales tickets come to me, I check them off on the cost machine and hand the cost into the bookkeeper and she figures the percentages: I do that on every invoice that comes into the store, a perpetual inventory all the time.

To the Court: There was one error in the cost prices I gave to these gentlemen. They are accurately stated except one which should be 4450 and they copied 4550 and there was another 4760. I never had such a lot. When goods are received at the store they are checked by someone in the store with the invoice to see that the goods are there as represented by the Bill that comes with
51 them and then I assign them a lot number. I give the lot number on men's clothing to Mr. Lacey—on gents' furnishings to Mr. Daymon. Then after the lot is assigned a number, I enter on a Rand card the quantity of goods, the date of their receipt and the cost mark. Exhibit 6 for identification is a sample of the card used there: the cards have different colors representing the different Departments. Exhibit 6 relates to boys' clothing. In the first column on the card is entered first the date of the invoice and below that dates of the sale; in the next column the quantity of goods that came in; in the next columns the sizes of the goods with the number of suits of each size; in the next column the number of the salesman that sold whatever was sold and the sales-ticket number, and in the next the amount that was sold with the date and in the next the quantity that is left after the making of the sale. Entries on those cards are made as the goods are sold. Each department has a different kind of ticket; they put their lot on that ticket and the amount it was sold for and the size: Each clerk has a book of sales tickets, 50 in a book numbered 1 to 50. Exhibit 5 is a sales slip from the clothing department. I tell it by the color and the lot. There are duplicate slips for each sale. When a sale was made by a

clerk, he would make out a sales slip, showing the date, the number used to designate the salesman, the amount he received, the number of the lot from which the sale was made, the number of articles that he sold and in cases where clothing was sold, the name of the purchaser. These slips come to me the next morning after the sale and I sort and check them and then enter them on the cards. The last two numbers of the lot number, representing dollars, gives the marked price to the clerk. The cost of the goods is never marked. When Mr. Dolan and the other gentleman were there, there was nothing on the tickets attached to any of the goods that gave
52 the cost mark. The lot number 900—12¾ was assigned to the first item mentioned in the first Count of the indictment on August 21, 1919, and has not been changed. The figures twelve and three-fourths in that lot number indicate that it is to be sold for $12.75. That mark was put there in August, 1919. That lot was purchased of Munves & Berlin; their lot number was 901. Exhibit 7 for identification is a pair of trousers from that lot number, I have just described which appears on Exhibit 6.

(Card marked Ex. 8 for I., J. H. W.)

Q. The second item in the first count of the indictment relates to and is stated as being wash suits lot number B 225,875, cost $4.16, and ask you if exhibit number 8 for identification is the card that represents that lot?

The Court: Is there some dispute as to this item.

Mr. Hinman: There will be as to the item $8.75; there will be no dispute about the cost price of the article.

The Court: Or the marked price.

Mr. Hinman: No, sir, not the marked price.

The Court: Do you object.

Mr. Cregg: Yes, I object to this testimony.

The Court: I will sustain the objection.

Exception.

Mr. Hinman: There is something in dispute about this and it is a serious dispute.

The Court: What is in dispute?

Mr. Hinman: This suit was in a lot, this lot number 3225875 is not an original purchase. This is an average lot; it is a transfer lot and I want her to describe what a transferred lot means.

The Court: We heard that yesterday.

Mr. Hinman: Yes, and I want to put it on the record.
53 Those were marked February 11th, 1920, that is the date charged in this indictment, after November 1st, 1919, those articles in that lot were marked, put on sale and they went into the alteration sale and they went into their half price sale which was held there in the store.

The Court: Assuming all that to be true, Senator, is *is* true we had a cost price of $4.16, is that the truth?

Mr. Hinman: That is the truth, that is an average cost, there were

articles in there that cost more and articles that cost less but that was the average cost.

The Court: That is the admitted cost to the Weed company.

Mr. Hinman: Of the entire lot some cost more and some cost less.

The Court: Therefore they cost $4.16.

Mr. Hinman: Not as a matter of fact but as a matter of trading there in the store.

The Court: It is a confessed charged cost by the Weed company.

Mr. Hinman: They marked them an averaged cost of $4.16.

The Court: Will you tell me of what importance it is in this case when it is admitted by them it cost $4.16.

Mr. Hinman: They were put on sale the next day in the sale, not at the selling price of $8.75 but at a selling price of $4.38 and ever since then they sold at $4.38 during the half priced sale and since then they sold for $4.65 and are still selling for $4.65.

The Court: You concede they were marked at $8.75.

Mr. Hinman: She has testified to that.

The Court: I will permit you to show that while they were marked at $8.75 they did not in fact sell them for that.

Mr. Gregg: We object to that testimony under this count
54 in the indictment because we say they attempted to exact excessive prices.

The Court: I will permit them to show the jury they made such prices, the cost price was $4.16, that they marked it on the ticket $8.75 and in fact they sold them less than that; if that is the way they did business and they satisfy the jury in that way that is for the jury.

Mr. Hinman: Note an exception to "if they did business in that way."

Q. What is there on that card that will enable you to tell us whether that was a transfer lot or an original purchase as it was carded there on February 11, 1920?

Objected to this method of proof. There is somebody that knows.

The Court: If she knows she may state. Objection overruled.

A. It denotes one thing, it is an odd lot; B 225; the next thing what indicates that it is a transfer lot is the cost, $4.16, then also I have——

Q. That is on this card exhibit 8 appears the word at the bottom of the card typewritten "transfer lot." Did you write that on there at the time?

A. I did. The second item in the first Count of the indictment, B 225,875, is a transfer lot. A transfer lot is made up of odds and ends—stock that does not move. The odds and ends left are put in one lot, that is they are taken from other lots that have become depleted and put in a new lot and given a new number. The cost given in such cases is the average cost. The total cost of all the suits is divided by the number of suits and that gives the average cost of each suit.

Weeds' store had an alteration sale in February of this year; a half price sale also. Ever since I have been connected with it, the store has at different times put on special sales.

55 To the Court: I couldn't tell you how long this so-called alteration sale lasted. I said in February. I couldn't tell you whether more than two weeks. I wouldn't want to say it lasted for a month. I couldn't tell whether it lasted two months. I was there every day. I have no record that shows that. I really don't know when it started.

To Mr. Hinman: I didn't have anything to do with the actual selling of the goods or the placarding of the goods. I kept the records as they came into my office from the clerks. Exhibit 9 for identification, consisting of forty sales slips are the sales slips for these suits in question from February 12, 1920 down to April 9.

The Court: In the first count of the indictment the Government charges a conspiracy they say conspiracy existed and then they say that in furtherance of the conspiracy this company did this, they purchased these suits, for example, these articles which are named in count one at the costs specified there, and then they don't say that they sold them, they say they marked them for sale at such and such prices and they say that those acts, that marking them for sale at that price constituted an overt act for the purpose of carrying out the purpose of the conspiracy. It does not make any difference whether they sold anything or didn't sell anything. Now you concede that they put those marks on there as marked prices.

Mr. Hinman: No. I can't put in the evidence all at once. They put them on with a marked tag, a marked placard for sale.

The Court: Is there any dispute that the marked card or the marked tag on these various articles in count one of the indictment was in fact the prices which are listed here in the indictment in count one?

Mr. Hinman: There is no dispute about that.

The Court: Then you concede that act was performed by

56 the company.

Mr. Hinman: They were not marked for sale at that price. That mark was put on there as showing the market value of those articles at that time and they went on sale at that time, the very next day they were marked for that price they went on sale in the alteration and half price sale and continued in this particular lot down to date with the placard on the counter of sales price and put in so many figures when the goods were exhibited and placed on sale. That mark was not put on there as representing the selling price, it was not put on there to represent a price to the clerks when they were sold. They cut the price in two and put them out on the counters for sale with a big placard with the price on and here is a sales slip for every one that has been sold from that lot ever since. Now when that mark was put on there it was not put on there for the purpose of indicating to the clerks that they were to sell for that price.

The Court: What was it put there for?

Mr. Hinman: It was put there to show what the then market value was and they were put on and advertised for sale and the placards were put on there. These men when they went there had an advertisement showing what they were sold for.

The Court: This girl cannot tell you when that sale took place. These men said they were there in April and she said they had an alteration sale along in April.

Mr. Hinman: Her testimony is they have been sold ever since.

To the Court: A tag was placed upon every article in the store showing the lot number and the selling price. The clerks got the selling price from Mr. Dayman. It was exhibited probably on a placard—a large placard—with the price over the tables where they are sold and they were advertised in the newspaper. The lot was on the tag. In size the tag was about an inch and a half oblong
57 in shape. It is on one of the suits there you can see.

Tag on the article marked Exhibit 10 for identification. This is the tag upon which the Company placed a marked for sale price. That is our system of business.

58 Exhibits 10, 11, 12, 13 and 14 for identification are five wash suits from lot B 225875, being the lot that is described in the second item of Count One of the indictment. The 875 is the part of that lot number that designates the marked price as it was on these suits February 11, 1920. I know that these suits represented by these samples, Exhibits 10 to 14, were put on sale after they were given that lot number; I know that that lot has continued on sale in Weed's store since that time. Exhibit 9 for identification (40 slips) represent, according to card, Exhibit 8, all the sales that have been made in that store from that lot since February 11, 1920. Those sales slips, Exhibit 9, from February 12, 1920, down to the 40th one, the last one, correctly stated the amount for which those wash suits had been sold. On each one of those sales slips appears the number of the lot, B 225875, according to my card and the sales slip. No sale has been made from that lot other than at the price named there.

To the Court: I didn't have anything to do with the sales—it is not in my handwriting but I have to take them up.

By Mr. Hinman:

Q. In the usual course of business there at Weed's store, do the clerks each day——

The Court: It is necessary to prove by the Clerk who made the sale.

Mr. Hinman: If that is so, it means that we must send down. We have nearly thirty different clerks there. Some of the sales were made by Mr. Brown and some by Mr. Daymon and others.

The Court: I will tell you one person you ought to send for if you haven't got him here, and that is the man or the saleslady

who can tell the jury whether in truth and fact this Company
59 marked half prices or sales here.

Mr. Hinman: We will produce no witness here that will testify to anything but the truth and the fact.

The Court: I was just pointing out what I considered the issue here. I will admit this evidence for the purpose of showing the unlikelihood of asking this price, having made sales later at a lower price.

Mr. Hinman: If I may have an exception. There is not any question made but that mark was proved here by undisputed evidence, that that mark was put on these goods on the 11th of February, 1920, not as a selling price—not marked for sale at that.

The Court: Why don't you prove that?

Mr. Hinman: That is just what I am proving by these slips.

The Court: There must be somebody in that store who can prove it. Haven't you got a Department Manager who can prove it?

Mr. Hinman: On the statement of the Court that we must call the clerks who actually made the sales, there is nothing else to do.

When these sales slips come to me each day from the different clerks, I check them up with the previous day. I don't check up with the cash, I take the cost off and give them the average. Taking for illustration the first sales slip of February 12, 1920, I entered that sale on the card.

Q. And that transaction was entered by you on this card, Exhibit —

Mr. Cregg: I understood the Senator went all over this at the beginning of this testimony and it don't seem to me to be necessary to be repeated now. I object to it.

Objection sustained. Exception.

I have entered that on each one of these sales slips on Exhibit 8.

Q. As you entered them from day to day what did you do
60 with reference to ascertaining whether those were correct or not, the prices marked there as the sales prices?

Objected to. Objection sustained. Exception.

Exhibit 8 for identification offered and received in evidence.

Wash suits, Exhibits 10 to 14 inclusive, offered and received in evidence.

Placard marked Exhibit 15 for identification shown witness.

I have seen that before. It was on one of the cases down stairs.

The Court: When was it there?

Mr. Hinman: She has stated she cannot give the exact date.

The Court: Then call somebody else.

Mr. Hinman: I will if I can.

Q. Do you know whether there is an item on there on this Exhibit 15——

The Court: Do you object to the use of this card until it is properly proven?

Mr. Cregg: I do.
The Court: Objection sustained.

By Mr. Hinman:

Q. Is there an entry of an item on there that represents this lot of wash suits, the second item in the first Count of the indictment?

Objected to. Objection sustained. Exception.

Q. Together with the selling price thereon?

Objected to. Objection sustained. Exception.

Mr. Hinman: I offer in evidence these 40 sales slips showing the sales made from this lot from February 12, 1920, the day after they were marked down, to date.

The Court: I understand these slips are in the handwriting of the salesmen?

61 Mr. Hinman: Yes, sir.
Objected to. Objection sustained. Exception.

By Mr. Hinman: Take these sales slips and tell me the names of the clerks in Weed's store who made these sales?

Objected to, the sales slips are not in the handwriting of this witness and the sales slips show for themselves.
The Court: The only object of that testimony would be an aid to you?
Mr. Hinman: Yes, sir.
The Court: You can obtain that some other time than under oath on the stand.
Exception.

Card marked Exhibit 16 for identification shown me is the card which is from my files and which represents lot number B 225675, boys' wash suits, third item in the First Count of the indictment. The entries on that card are in my handwriting. That lot number B 225675 was given on February 11, 1920. That was a transfer lot. The average cost of that lot was $3.45. The marked price of that lot was $6.75.

Q. Did that lot go into the alteration sale that was put on in Weed's store at about that time?

Objected to.
The Court: Unless the time is shown and fixed when the alteration sale took place, I will exclude it. The offense is charged as having been committed in April. This witness says the so called alteration sale was in February.
Exception.

Slip marked Exhibit 17 for identification shown me are sales tickets for B 225675.

Q. What is the date of those sales tickets Exhibit 16 that indicates the first sale, what is the date of the first sale?

Objected to this witness giving any testimony from those
62 sales slips.

By the Court:

Q. The sales slips are not in your handwriting?
A. No.

The Court: I will sustain the objection.
Exception.

Those sales slips came to me from day to day from the clerks there in the store and I used those in keeping the records of original entry in Weed's store in the regular course of business during the time covered by them. On card Exhibit 16 for identification the date of the first sale from that lot is February 11, 1920. That is in my handwriting. These sales slips, Exhibit 17, show the dates of the sales of those articles and card, Exhibit 16 also shows the date of each sale that has been made from that lot since February 11, 1920. Exhibit 16 shows the number of wash suits sold each day from that lot. It does not show the number of the clerk making the sale.

Exhibit 16 received in evidence.
Sales slips, 35 in number, marked Exhibit 17 for indentification, offered in evidence.
Objected to and excluded by the Court at this time.
Exception.

These articles of clothing marked Exhibits 18 to 23 inclusive for identification are suits from lot No. B 225675. That is from the lot that is described in the Third item of the First Count of the indictment. Going back to the other time that I said was a transfer lot, that was made up of wash suits that had been purchased sometime before February 11, 1920, and were in other lots and put together.

63 If I had the card, I could tell over what period of time those wash suits in those different lots had been purchased. They were carded back as far as November 27, 1917. They were evidently bought before that and brought into the store at that time. This third item of the first Count was a transfer lot. I can tell approximately over what period of time they were purchased—probably around 1917, they might be 1916. The cost $3.45 was the average cost. They were carded February 11, 1920, with an average cost of $3.45. The mark B 225675 was assigned and given to them that day. Sales slips marked Exhibit 17 for identification represent the sales made from that lot after February 11, 1920. Wash suits, Exhibits 18 to 23 inclusive offered and received in evidence.

Card, Exhibit 24 for identification is a card for B 225275 boys' wash suits and relates to fourth item of Count One of the indictment.

Boys' wash suits, marked $2.75, cost $1.11—not $1.10 as stated in the indictment. That was also a transfer lot, the $1.11 being the average price. That lot was made up and marked February 11,

1920. The marked price was $2.75. I don't believe they were sold for that though. The tag on Exhibit 18 is marked B 225675.

To Mr. Cregg: $2.75 is the value of the garment, the market on the garment.

To Mr. Hinman: Each article carried a tag or a mark.

To the Court: That had a mark for value, a marked for sale price. It was on every article.

The selling price is whatever the article that is sold is worth. The object of putting that tag on the piece of clothing was for a perpetual record. I don't think it had something to do with the customer.

(By the Court:)

Q. Would you imagine what the fact about it was—wasn't
64 it this, madam, that a customer, if he came into the store, could pick it up and see what the price of that goods was?

A. No, I don't believe they could.

Q. Anybody could come in and take that tag up in their hand and see what the marked price sale was.

Mr. Hinman: I object to that on the ground that it is a conclusion and incompetent.

The Court: You object to it and I will overrule the objection.

Exception.

To the Court: I don't think the purpose of that tag was so that a customer who came into the store could look at the goods and look at the tag and see the price. We had our own private record, a code system so that the cost would be private to us.

Q. The only interest the public had in that article was to see what they could buy it for?

Mr. Hinman: May I enter an objection on the same grounds?

The Court: Yes.

Exception.

I don't know whether the only object the public had was to find out what they could buy it for.

To Mr. Hinman: The prices that were on those tags as far as I observed gave the information to the clerk as to the marked price of the article.

To the Court: That was the information to the clerk, the marked price.

I think the customer would ask the clerk; it was for our own benefit, it wasn't for the public. The customer came and asked the clerk the price of the suit and he would look at the tag and undoubtedly would get the price there and he would tell the customer the price.

(By the Court:)

Q. He offered it to the customer for sale at that price?

65 Objected to on the ground it is incompetent, improper and calls for a conclusion.

A. Unless that was on a special sale. Unless the goods were marked on a sale he would offer it to the customer at that price. The mark on the garment was for the purpose of giving the price to the clerk.

To Mr. Hinman: Ordinarily and except under circumstances where special sales were on, a marked down sale or a special sale or a half-price sale, the mark on these tags was the price at which the article was sold and would be the amount that the clerk would give the inquiring customer as the price. When alteration sales, special sales, half-price sales were put on in the store, as they were occasionally, there would be given to the clerks to indicate that the ordinary usual price marked on those tags would not be followed, a placard designating what is on sale and also advertisements cut from the daily newspapers placed around throughout the store. In those cases the placards given to the clerks would govern instead of the regular prices. The mark on the tags which contained the marked prices never changed as long as that article remained in a given lot. The selling price would be made by the placards and at the same time instructions were given to the clerks for the special sales.

Exhibit 24 offered and received in evidence.

Slip, Exhibit 25 for identification, consisting of 36 slips or pieces of paper, is sales slips for B 225275, which came to me in the regular course of business from which I made the entries on Exhibit 24.

Exhibit 25 offered in evidence.

To the Court: Those are not in my handwriting.
Mr. Cregg: I object.

Objection sustained. Exception.

66 Suits marked Exhibits 26, 27 and 28 for identification are three wash suits from lot B 225275. I know this from the red lot on them. The lot mark is on the little tags on which the exhibit number has been entered by the stenographer here. The last three numbers 275 of the lot number No. B 225275 represents the marked price. There is never anything on those garments that represent the cost of the article.

To Mr. Cregg: That means the marked value of them.

To Mr. Hinman: That was the marked for sale price. Except for a special sale that would be the amount that the clerk would go by. That lot number and that price was given to that particular lot of wash suits on February 11, 1920. Mr. Walter Daymon gave me the price to be marked on those items, 1, 2, 3 and 4 of the First Count of the indictment.

To the Court: He is the manager of the children's Department.

Conceded that Charles A. Weed, since January 1, 1920, has been the President of Weed's Inc., and that Gurdon H. Smith is the General Manager, Secretary and Treasurer.

To the Court: Mr. Smith is the manager, the selling manager. He is not the gentleman that arranges about the prices to be asked. Mr. Daymon did that on the wash suits.

Exhibits 26 to 28 inclusive offered and received in evidence.

These articles in the lot represented by Exhibits 26 to 28 went on sale February 11, 1920, the day they were marked. Exhibit 29 for identification is a transfer sweater lot D 1350. Weed's store never had any lot number of hosiery B 1350. Lot B 1350 refers to sweaters.

The Court: I will strike out hosiery B 1350 sweater, selling price $3.50 and all testimony in reference thereto as an overt act, as no evidence of an overt act in the furtherance of a conspiracy.

67 To Mr. Hinman: Exhibit 30 for identification is a card for transfer lot D 1850 sweaters. Weed's store did not have a lot of hosiery No. D 1850, cost $4.67, marked price $8.50. They did have a lot of boys' sweaters lot D 1850. This card represents that lot of sweaters in March 1920. This was a transfer lot made up of sweaters from different lots put into one lot January 27, 1920. That price $8.50 was given to me by Mr. Daymon. The average cost price of those sweaters was $4.67. The marked price for sale as given in the lot number is $8.50. This lot was on special sale. Slips marked Exhibit 31 for identification are the sales slips for D 1850. They are not in my handwriting.

Exhibit 31 offered in evidence.

Objected to. Objection sustained. Exception.

None of the sales slips that are produced here are in my handwriting. I make no sales.

Card, Exhibit 30 offered and received in evidence.

Those sweaters were purchased at different times, probably from 1916 on. Exhibits 32 to 36 inclusive for identification are five sweaters from lot D 1850.

Mr. Hinman: I move to strike out the testimony concerning this Sixth item of Count One which charges——

To Mr. Cregg: $8.50 represents the value—it is the marked for sale value—the cost of those sweaters was $4.67, and the marked value was $8.50.

By the Court:

Q. Now why do you say that?
A. They were not sold for $8.50.
Q. Just look at me for a moment.

Objected to and take an exception.

The tag on those goods of $8.50 was for the purpose of the sale, the asking price of the goods except when there was a sale
68 on. I can tell from my sales slips when there was a sale on in this store.

Exhibit 31 for identification handed witness.

These sweaters, the first sale was held February 1, 1920, the last sale was on February 28. Evidently there wasn't any sale on March 11th. I haven't any record of it. I don't know there was a sale on March 11 when these officers came. I haven't any record of it. If, on that day, the price was fixed on the garment as the marked for sale price at $8.50 and there was no sale, I really don't know that is the price it was offered to the public at. I couldn't tell you whether there was a sale on March 11 when the officers went in because there wasn't anything sold on that day. There was not anything sold after that day of that lot. I have all the slips in Court here that represent the sales of that lot. The last I have recorded is February 28th.

To Mr. Hinman: I saw a placard there with the sweaters represented by Exhibit 31 for identification marked down-stairs on the first floor. I couldn't tell you the exact date when the placard was there.

Exhibits 32 to 36 inclusive offered and received in evidence.

Mr. Hinman: I think you didn't rule on the motion that I made.
The Court: Do you object to this motion?
Mr. Cregg: I object now.
The Court: The only inaccuracy is it states hosiery instead of sweaters. I think I will deny the motion.

Exception.

Exhibit 37 for identification is a transfer lot of E2350, men's two piece underwear suits. It represents lot No. E 23½, the lot which is the Seventh item of Count One; cost $1.40 each, marked price $3.50 each.

69 To the Court: That is the cost price and marked for sale price.

To Mr. Hinman: The cost price on my card is given in code P. C. N. representing $1.40. The marked price for sale is 3½. That was a transfer lot. It represents two-pieced men's underwear knit goods. Exhibit 37 doesn't show the concern from which purchased. That marked for sale price was put on September 2, 1919. Mr. Daymon gave me the marked price for sale. So far as I know that is the price for which those goods were sold. A two-pieced suit each garment sold for $3.50 apiece. Those were purchased earlier than 1919, probably 1916.

Exhibit 37 offered and received in evidence. Card, Exhibit 38 for identification.

Thereupon SOLOMON MUSVES called as a witness in behalf of the defendants, being duly sworn and examined by counsel for the defendants testified as follows:

I live at 210 West 98th Street, New York City. My concern is Munves and Berlin. Have been a member of that firm about ten years. Our business is manufacturing boys' clothing. Exhibit 7 for identification is a child's Norfolk suit sold by us to C. A. Weed & Co. about the beginning of March 1919 I think. I am familiar with the market value of that suit on October 22, 1919.

Q. What was the market value, the wholesale market value, jobber's value or manufacturer's value of that suit October 22nd 1919?

Objected to as incompetent, irrelevant and immaterial.
Objection sustained. Exception.

By Mr. Hinman: If Your Honor please in order that I may have on record the market value of that on October 22nd, 1919, the time this act took effect on the theory, regardless now of the question of whether Congress may by an enactment of the statute provide
70 from and after an act takes effect, an article of clothing, or whatever it may be covered by that act shall not be sold thereafter, an article purchased thereafter shall not be sold thereafter at more than a certain profit or a certain price. Our position is that this article here as well as other articles involved having been purchased long before October 22nd, 1919, when this act took effect became the property of C. A. Weed and that any increase in market value of that article between the time when he bought it, when it was his property to do with it as he saw fit, up to the time that act took effect October 22nd, 1919, that it was a property right, his to do with absolutely as though it were a horse or cow that was bought in the spring, Congress was without power to say that the owner of that horse or cow—to say thereafter he couldn't sell it above the purchase price of $25.00, if that was it, in the spring and 10 or 15 per cent profit added. It became a vested property right; it was theirs, and that Congress was without power under the constitution to deprive Weed and Company on that date of selling it at a fair and reasonable advance over the then market value, and that we are not limited here in this case to prove on the one hand the cost of goods two or three years before, but we are entitled to show this, the value of the article when this act took effect, this amendment of October 22nd, 1919, took effect. Otherwise it deprives us of our property and liberty of contract. I will offer that evidence on that theory if Your Honor please.

The Court: I will exclude it. My reasons therefore are, this Legislation was under the war power. Congress for reasons that were sufficient to themselves deemed it wise to place this restriction on the statute book as the law of the land and it is up to the Court to enforce it as the law of the land as we find it. The argument of
71 the counsel taking property without due process of law or in other words in violation of the 5th amendment of the Constitution I think is not—Congress did not by this enactment take private property for public use or from the individual. Under the war powers of Congress the Congress of the United States had the right to say during this emergency that the seller of merchandise who saw fit to enter into a business which had to do with the disposi-

tion and sale of wearing apparel must do so only after charging a fair and just profit. The factors which are of importance in determining whether an unjust and unreasonable rate or charge has been made are not such as counsel referred to but are the elements which come into an every day business man's life, and that is what the goods cost him, what are his overhead charges, what are his interest on the investments, what is his cost of doing business and then he is permitted a reasonable and fair profit of return which he may add to his price after calculating the foregoing considerations and then fix his price; if he does that and does what other reasonable and prudent men would do who are engaged in that trade he does not violate the law; he keeps himself well within the law. I will permit testimony by counsel that have to do with any of those elements which I think are the determining factors in the determination of what is an unjust and unreasonable rate or charge.

Mr. Hinman: And Your Honor will give me an exception. One step further, it brings up the question in another form. I offer to show by this witness if Your Honor please the value, the market value of this same lot of goods in March of 1920; that is the date when they visited the store. That is on the same theory and raised as another question that I want to raise now by this offer, and that is what the market value was at the time they were marked and put on sale. It is offered on the same grounds.

72 Mr. Cregg: The same objection.

The Court: Same ruling.

Exception.

Mr. Hinman: Let me also call Your Honor's attention to the fact, and I put it on the ground that a fair construction of the act itself does not show any intent or purpose on the part of Congress to legislate with reference to existing values or prices or charges. In other words there is nothing there indicating that they intended that this amendment should operate or this statute should operate in the nature of an ex post facto law.

The Court: Congress intended to make an infraction of the statute which it passed, the conduct of the seller, the price he charged subsequent to the passage of the effective date of the law.

Mr. Hinman: Your Honor will note an exception and may I call Your Honor's attention to just one thing that happened in Congress in that connection. It is in reference to the legislation of the House itself.

The Court: I don't care to hear that.

Mr. Hinman: This is an enactment of the statute.

The Court: You mean it was some claim of a senator during a debate?

Mr. Hinman: No, this refers to an act passed by Congress itself and approved by the President; the fact being that during the early part of the war the Secretary of war took over and obtained a quantity of nitrate of soda. The Government purchased it for war purposes and had it on hand. They had about 50,000 pounds here in April and a bill was introduced in the House and in the Senate because of the urgency of the farmers of the country for nitrate in the use of fertilization.

The Court: They passed the bill.

73 Mr. Hinman: Yes, they passed it, and it has been signed by the President and the proposition is that nitrate of soda be distributed to the agriculturists of the country to be returned by them in like kind during the year; and an amendment was proposed to that and I read the amendment. It was offered by Congressman Hull of Iowa: "Strike out all after line four on page one, and insert the following: 'to sell for cash at prevailing market price at the time of the sale thereof, to such distributors or users thereof, in the United States, as shall request the same, and in such quantity to each, as he shall see fit, not to exceed in the aggregate 50,000 tons of nitrate of soda, now held as a reserve supply of the War Department, the proceeds of such sale to be repaid to the proper item of the current appropriations, originally made for such purposes.'" Indicating that Congress itself recognized even now an emergency which Your Honor speaks of as War emergency. With this emergency, whatever it may be, Congress does recognize that in disposing of its property the Government shall exact and take the market price rather than what the Government paid for it which I submit bears upon the construction and intent and purpose of this act.

The Court: That has no analogy. What they say here is an unjust rate or charge. You see Congress couldn't lay down the rule what would be an unjust or an unreasonable rate or charge; they couldn't say what element would enter into it.

Mr. Hinman: The point is in determining what is unjust and what is unreasonable. The determining factor is whether or not that test shall be applied on the then market value or whether it will be applied to the cost.

The Court: It must be applied to the position the particular defendant finds himself in.

Mr. Hinman: Your Honor will permit an exception.

74 The Court: Yes.

Mr. Hinman: I offer to show as to each item remaining in the indictment of which complaint is made and which we are charged, I offer to prove by competent witnesses, I have them here, the manufacturers, and I offer to prove by them the market value of each of the articles mentioned in the indictment on October 22nd, 1919.

Mr. Cregg: That we object to.

Mr. Hinman: Each item in count one and the others.

The Court: You just call up your experts that you intend to call as to values.

To the Court: I sold some of these goods to the defendant which I have in my hand.

Q. What price did you charge them?

Mr. Hinman: I object to that on the ground unless the witness can tell that it is too remote in time, immaterial and irrelevant.

By the Court:

Q. What did you charge them?
A. The price on this suit was $8.00, the selling price. We charged $7.25 for that.

Mr. Cregg: Is that the first suit set forth in this indictment?
Mr. Hinman: Yes, sir.

To Mr. Cregg: I sold that to the defendants for $7.25.

Mr. Hinman: I don't believe—well these men are here. You will rule the same—I don't believe but what the question is raised with reference to all that kind of evidence.
The Court: One is as good as a dozen.
Mr. Hinman: I think it is covered but I want the last witness—I offer to show by Mr. Nunves the replacement value to Weeds on October 22nd, 1919, of this particular lot.
75 The Court: You did that by attempting to show the then market value.
Mr. Hinman: On those two dates *in* October 22nd, 1919, and in March, 1920.
The Court: Yes.
Mr. Hinman: I offer to show by Mr. Nunves that Weeds, Inc., the defendants, on October 22nd, 1919, would have had to pay the price at which those goods were marked and sold at that time in October 22nd, 1919, if they had bought them in the market they would have had to pay that price.

Objected to.

The Court: I will exclude that.

Exception.

Mr. Hinman: The same offer as to March, 1920.

Same objection.

The Court: I will exclude that.

Exception.

Thereupon EULETA MCCARTHY, witness for the defendants, was recalled.

Exhibit 38 offered and received in evidence.

To Mr. Hinman: Card marked Exhibit 39 for identification represents lot number E 24 knit goods, cost $1.40, marked price $4.00. This was a transfer lot. The $1.40 is the average cost, not the actual cost, of each garment. The average cost of $1.40 and marked price of $4.00 were put on that lot July 17, 1918. It was never changed from that time on. That lot of goods remained from July 1, 1918, with that lot number and that mark.

To Mr. Cregg: The cost was $1.36. Our cost mark on Exhibit 39 is P. E. U., that means $1.36.

To the Court: The price of selling is $4.00.

Exhibit 39 offered and received in evidence.

76 Lot number E 24 and price given in July, 1918, was given by Mr. Spencer Gaffney, who at that time was employed in Weeds'. He is not there now and has not been for some time. Articles marked Exhibit 40 for identification is a sample of lot number E 24 covered by the Eighth item of Count One.

Exhibit 40 offered and received in evidence.

Card, Exhibit 41 for identification relates to union suits lot number C 8-6, cost $3.62½, marked price $6.00, Ninth item of Count One. That is an original lot. A marked price was given it August 12, 1919, by Mr. Daymon. It was purchased for Weeds' store probably in the Spring of 1919, or fall previous.

Exhibit 41 offered and received in evidence. The cost designation is E. U. R. ½ which equals $3.62½.

To Mr. Cregg: The marked for sale price is $6.00.

To Mr. Hinman: The marked price is indicated on the card and on the lot with C 8-6, the figure 6 indicating the marked price for sale. Where there is just one figure if the sale price is $2.00, $3.00 or $4.00, it would be just the last figure in the lot number.

Exhibit 42 for identification is one of the undershirts from this lot C 8-6, Ninth item of Count One, a heavy weight union suit. These item- of knit goods being the Seventh, Eighth Ninth and Tenth items of Count One, is what is known as the Duofold underwear manufactured by the Duofold Underwear Company. Henderson and Ervine are the sales agents for the Duofold Company.

Exhibit 42 offered and received in evidence.

Exhibit 43 for identification refers to union suits lot No. C 6-6, cost $3.39, marked price $6.00. The cost is $3.39, sales price $6.00.

Exhibit 43 offered and received in evidence.

77 Suit marked Exhibit 44 for identification.

To the Court: I don't know whether these union suits went into any kind of a sale or the silk shirts, or men's suits nor overcoats nor hats. One cap did.

To Mr. Hinman: Exhibit 43 marked September 1919 represented a transfer lot. Those articles were purchased and went into that lot during 1916, 1917 and 1918. Mr. Daymon gave the final mark on this lot, the marked price for sale, $6.00.

Exhibit 44 offered and received in evidence.

Card Exhibit 45 for identification relates to the Eleventh item of Count One, lot No. S 7-2. Referring to the prior cards with that lot that Eleventh item represents a transfer lot of shirts which ex-

tended back as far as 1918, some of which was purchased as early as 1918.

Exhibit 45 offered and received in evidence.

The cost mark, the average cost price of the articles covered by Exhibit 45 was $1.00. The mark for sale of that lot was $2.00. Exhibit 46 for identification represents two shirts from S 7-2.

Exhibit 46 offered and received in evidence.

That marked price for sale was put on that lot by Mr. Gaffney.

Card, Exhibit 47 for identification represents the Twelfth item of the First Count, shirt lot S 2-165, cost $1.12½ marked price, $1.65. The cost price on that card is P. X. R. ½ $1.12½, the marked for sale price is $1.65. Exhibit 47 is a continuation of card Exhibit 48 for identification of the same lot. This lot S 2-165 was marked September 23, 1919 and the marked price for sale given on that date by Mr. Daymon. Those shirts were purchased probably in the Spring of 1919, or the previous fall, and the first of them received September 23, 1919.

Exhibit- 47 and 48 offered and received in evidence.

78 Shirt, Exhibit 49 for identification is one of the shirts from lot S 2-165.

Exhibit 49 offered and received in evidence.

Card, Exhibit 50 for identification.

Weed's store never had any shirts with lot No. 15. They did have on December 28, 1918, and thereafter a lot of shirts marked S 1-5. Exhibit 50 was a continuation of the previous card of the same lot. That lot number S 1-5 and that marked price for sale was given that lot sometime in 1918 by Mr. Gaffney. It evidently was an original lot because I have 14 on my last card. I know that a luxury tax is imposed on the sale of shirts above the price of $3.00.

Objected to as immaterial.

Mr. Cregg: May I have the answer stricken out?

The Court: It may be stricken out.

Exception.

To Mr. Hinman: This lot of shirts after it was marked in December 1918 continued at that same marked price and didn't go into any marked down sale or special sale, and so far as I know was sold in the store at the marked price.

Mr. Hinman: I now move to strike out or have dismissed the 13th item on the ground the lot number is erroneous.

The Court: Objection overruled.

Exception.

Exhibit 50 for identification offered and received in evidence.

Four shirts marked Exhibits 51 to 54 inclusive for identification are samples from this lot S 1-5.

Exhibits 51 to 54 are offered and received in evidence.

Card, marked Exhibit 55 for identification. Weed and Company never had a lot of shirts in their store at any time with lot number 11-5. They did have a lot of shirts with lot number S 11-5.
79 Exhibits 55 refers to this lot attempted to be described in the 14th item of the first Count. It is the card for S 11-5. This card, Exhibit 55 for identification, is a continuation of another card, Exhibit 56 for identification. The cost mark on Exhibit 55 is R. I. T. ½, which is $2.87½, the marked price for sale is $5.00 fixed by Mr. Gaffney. That lot number was given and it was marked at that price for sale March 18, 1919 and continued on that lot over that time without changing.

Exhibits 55 and 56 offered and received in evidence.

Shirts, Exhibit 57 for identification is a sample from S 11-5.
Shirt, Exhibit 57 offered and received in evidence.
Cards marked Exhibit 58 and 59 for identification.
Weed's store never had a lot of shirts marked 9-3. In 1918, 1919 and 1920 it did have a lot of shirts marked S 9-3. Exhibit 58 is a continuation of Exhibit 59. Exhibit 58 and 59 for identification relate to the item S 9-3. The cost mark on that lot is P. I. T. ½, which is $1.87½. The marked price for sale is $3.00, assigned by Mr. Gaffney on a previous card to that and then by Mr. Daymon. This marked selling price of $3.00 was given sometime before 1918, probably 1917, or might be 1916. At any event it was as early as 1918. The marked price for sale was not changed, continued right down through to date.
Shirts marked Exhibits 60 and 61 for identification are from lot S 9-3.

Exhibit- 60 and 61 offered and received in evidence.

Weed's store never had a lot of silk shirts marked 6-10; in 1919 and this year they have a lot of silk shirts marked S 6-10. Card marked Exhibit 62 for identification relates to lot S 6-10. The cost price of that shirt is U. N. X., or $6.00, and the marked price
80 for sale is $10.00. That lot number was marked October 23, 1919, given by Mr. Daymon and has continued down to date.

Exhibit 62 offered and received in evidence.

Shirt, marked Exhibit 63 for identification is a shirt from S 6-10.

Exhibit 63 offered and received in evidence.

Weed's store never had a lot of silk shirts with lot number 1-12. It did have a lot of shirts marked S 1-12.
Two cards marked Exhibit- 64 and 65 for identification.
Exhibit 65 is a continuation of Exhibit 64. They apply to lot number S 1-12. The cost mark of those shirts is T. N. X. or $7 each. The marked price for sale is $12.00.
To the Court: Those shirts were not in any special sale.

To Mr. Hinman: That marked for sale price of $12.00 was given February 13, 1919 by Mr. Gaffney.

Exhibits 64 and 65 offered and received in evidence.

Shirt, marked Exhibit 66 for identification, is from lot S 1-12.

Exhibit 66 offered and received in evidence.

Card marked Exhibit 67 for identification relates to hats lot number Z 1-18, cost $10.25, marked price $18.00. The cost mark is P. N. R. A., which is $10.25. The marked price is $18.00. That lot number was assigned December 5, 1919 by Mr. Daymon.

To the Court: It is a man's hat.

To Mr. Hinman: That hat was purchased of Bill & Caldwell. It was an imported velour hat.

Exhibit 67 offered and received in evidence.

Hat, marked Exhibit 68 for identification is one of the hats from lot Z 1-18.

Exhibit 68 offered and received in evidence.

81 Weed's never had in its store a lot of hats marked B 4. It did have in the fall of 1919 or 1920 a lot of hats marked B 4-12. Exhibit 69 for identification relates to that lot of hats. The cost mark is U. A. N. or $6.50, its cost. The marked price for sale is $12.00. That lot of hats was given that mark October 11, 1919 by Mr. Daymon.

To the Court: That card does not show when we purchased that hat. They usually purchased it—a winter hat, they usually purchase it in the summer or fall before. The card shows the first marked price first put on there. From the time we put the hat on sale in the store and fixed the price on it, that card system showed what that price is. I have got the first price that was fixed for this hat, $12.00. It remained at $12.00 and never went into any sale.

To Mr. Hinman: When the lot number is assigned to any article or to a given lot of goods, that number and that card remains as so allotted until a change is made by transfer to another lot number or until sold out. When the lot becomes depleted so there are a few left to sell out a new card is made for the transfer lot. The old card is put into the dead card file. I lay that aside in what I call a dead card file and use a new card.

To the Court: I said several times there was what I called a market value; the swoaters that were put on the book but still remained at $8.50, but they didn't sell it at $8.50.

To Mr. Hinman: The wash suits never changed and any lot was never changed unless they were averaged in. Hat, Exhibit 70 for identification is from lot B 4-12.

To the Court: That is an imported hat. The only reason I know that it is stamped; I can't tell from the nature of the goods.

To Mr. Hinman: All I know about it personally is the stamp there says it is an imported hat, I don't know what they call it.

82 Exhibit 70 offered and received in evidence.

Weed's store never had a hat with lot number A-1. It did have a lot of hats with lot number A 1-10. Exhibit 69 came from Bill & Caldwell.

Card, Exhibit 71 for identification covers the 20th item of Count One of the indictment, A 1-10. The cost mark on that card is U. N. X. or $6.00. The marked price for sale is $10.00, given or fixed by Mr. Daymon February 23, 1920; that lot number has remained the same.

Exhibit 71 offered and received in evidence.

Two hats marked Exhibit 72 and 73 for identification represent samples of hats from A 1-10 purchased from John B. Stetson and the Dunlap Company. One is a stiff or derby Dunlap and the other is a stiff Stetson hat.

Exhibits 72 and 73 offered and received in evidence.

Card, Exhibit 74 for identification represents cap, Lot number W-11, cost $.37½, marked price $1.00. It is a transfer lot. The first of those caps were purchased by Weed's store further back than 1916. The marking of that lot was made October 15, 1917, the cost price as marked was $4.50, $.37½ each transferred. That was the average price meaning some cost more and some less. The marked price for sale was $1.00. Mr. Gaffney gave that price back in 1917.

Exhibit 74 offered and received in evidence.

There was a special sale on that lot. I don't remember when. Various sales slips marked Exhibit 75 for identification enable me to state those caps did go on sale at special price in January, 1920. There was one cap left in that lot after that sale closed. Those caps were sold at the January Special sale at $.69. Cap, Exhibit 76 for identification is the only cap of W 11 that was left.

83 Exhibit 76 offered and received in evidence.

I am able to say this one cap has been carried in stock for some years. Card Exhibit 77 for identification relates to the 22nd item of Count One, lot 36360. The cost mark as given on the card is E. N. A. N., $30.50, marked price for sale, $60.00, given by Mr. Harry Lacey.

To the Court: Mr. Smith fixed the price.

To Mr. Hinman: Those suits were probably purchased in the fall or spring before 1919.

Exhibit 77 offered and received in evidence.

Suit, Exhibit 78 for identification, is one of the suits from that lot.

Exhibit 78 offered and received in evidence.

Weeds never had a lot of suits in stock with the number 4760. Since this indictment was found I have endeavored to locate a lot of men's suits there to which some part of that number could be applied and couldn't do it. I looked for 40760. Weeds never had such a lot as that. That one I have been unable to trace. So far as I know, no one in the store could trace that one.

Mr. Hinman: Let me move to strike that out.
The Court: Denied as a question of fact to the jury.

Exception.

Card, Exhibit 79 for identification, relates to the 24th item, Count One, lot number 32375. The cost mark is C. N. X. N. $40.00, marked price for sale $75.00, represents a lot of men's suits purchased of Stein-Bloch of Rochester, N. Y. There were only two sales made. Exhibit 80 for identification are two sales slips from which I made the entries from Exhibit 79. Originally there were three suits in that lot. There is one left. Exhibit 81 for identification is the remaining suit.

Q. What were the two suits in that lot sold for?

84 Mr. Cregg: I object to that; this witness didn't make out the sales slips.
The Court: Sustained.

Exception.

Exhibits 79 and 80 for identification offered in evidence.

Mr. Cregg: I object to the sales slips.
The Court: Sustained.

Exception.

Suit, Exhibit 81 for identification offered and received in evidence.

The two suits were sold January 23, 1920; Mr. McDonough made sale No. 7 and No. 1 made that. That is the house book; anybody. That was marked December 9, 1918. Mr. Smith gave the sales mark. Card, Exhibit 82 for identification covers Lot 31550 the lot referred to in 25th item of Count One. The cost mark on the card is R. X. N. A., $22.05, marked price for sale, $50.00. That marked for sale price or lot number was given August 6, 1919, by Mr. Smith. This was a transfer lot. $22.05 represents the average cost, not the actual cost. There were eleven overcoats in that lot. Those various coats were bought about 1917 and 1918, some of them as early as 1917.

Exhibit 82 offered and received in evidence.

Exhibits 83 and 84 for identification are two overcoats from lot 31550 purchased of Alfred Decker & Cohn.

Exhibits 83 and 84 offered and received in evidence.

Sales slips marked Exhibit 85 for identification are the sales slips of 31550.

Exhibit 85 offered in evidence.
Mr. Gregg: I object to the sales slips.
The Court: Sustained.

Exception.

Exhibit 86 for identification refers to lot 31875, the 26th item of Count one. That is a transfer lot. The cost given on the card is E. P. U. X., $31.66, marked price for sale $75.00 gives September 10, 1919 by Mr. Smith. The cost of $31.66 is an average cost. Those coats were bought in 1917 and 1918 and doubtless previous to that. From the card I cannot tell whether or not the costs in that lot went into any special or alteration sale.

85

Exhibit 86 offered and received in evidence.

Exhibits 87 and 88 for identification are from lot 31875.

Exhibits 87 and 88 offered and received in evidence.

Card, Exhibit 89 relates to the lot of coats mentioned in Count Two, 38040. A suit No. 38040 was sold January 8, 1920 to J. H. Nelson.

Sales slips marked Exhibit 90 for identification.

This was an original purchase. Cost on card was R. N. X. N. $20.00, sold for $40.00.

Exhibit 90 offered and received in evidence.

Q. I show you Exhibit 91 for identification and ask you if that is the suit represented by that sale?

The Court: That can't be the suit; Nelson must be wearing it.
Mr. Hinman: As a matter of fact Nelson is in Court and that is the very coat that was sold to him.
The Court: Call Nelson then.
Mr. Cregg: I object to it.
The Court: Sustained.

Exception.

Exhibits 89 and 90 offered and received in evidence.

Exhibit 92 for identification is an invoice of Stein-Bloch under date of December 12, 1919 (Count Two of the Indictment). Going back to Count Two, the sale in January, 1920 from lot 38040; that lot of clothes was bought in the Spring of 1919. I didn't make or have anything to do with this sale of a suit for $40.00—the item of January, 1920—Count Three.

Card, Exhibit 93 for identification relates to lot No. 20040, Count Three. That was a transfer lot.

Q. What is the cost marked on the card of those goods; what did they cost Weed & Company, the average price of the suits in
86 that lot according to that card?

Objected to.
Sustained.
Exception.

I had something to do with ascertaining the average cost of the suits of men's clothes that went to make up this transfer lot 20040 mentioned in Count Three.

To the Court: I had all the figuring to do with it after some member of the firm gave me the lot.

To Mr. Hinman: Nobody assisted me in the figuring. Exhibit 94 is one of the cards that I kept there which relates to the same transfer lot 20040. I figured the average cost to be $21.80 instead of $12.10 as stated in the indictment. Exhibit 94 for identification is the card of lot 20040, an odd lot of young men's fancy suits. At the time these Government inspectors were at the store this card, Exhibit 93 was closed and was in the dead files, but it did represent and has on it the suit of clothes that has been sold to Nunn out of that old number 20040. Between the date when Nunn bought that suit of clothes and the date when the inspectors were there, the balance of the suits remaining on this card represented by Exhibit 93 had been transferred into another lot, so that Exhibit 93 had become dead and gone into the file of dead cards. At the time these two inspectors were there I had given the same lot number, 20040 to Young Men's odd suits of small sizes, twos, threes and fours, so when they asked for the cost of lot 20040, I thought it related to that same lot of small sized suits.

To the Court: It wasn't really any mistake on my part. It was an honest mistake.

To Mr. Hinman: The working lot 20040 related to these young men's suits and didn't relate to the suit already sold on that lot of clothes. I gave them the cost on the new working card.

To the Court: The cost price was $21.80 instead of $12.10.

Exhibits 93 and 94 offered and received in evidence.

87 The suit sold to Nunn remained in the store. I don't know whether Dr. Nunn paid for the suit at that time but he didn't get it.

The Court: Where is Dr. Nunn now?

Mr. Hinman: In Binghamton. Exhibit 95 mentioned in Count 3 is Dr. Nunn's suit. Exhibit 95 offered in evidence.

To the Court: I didn't make the sale. When I went to look up the evidence on it I discovered it had not went out of the store; then I saw I made that mistake. The mark on the sales ticket identifies it. It is charged to Dr. Nunn. There is no mark on the suit itself

but on the ticket that is on the suit. The ticket is right here. I don't know whether that is paid for or not. It is marked "called for," and he didn't call for it yet.

Q. I show you Exhibit 96 and ask you if that is the sales ticket?

To the Court: I didn't make the sales ticket out.
Mr. Cregg: I object to this evidence.
The Court: Sustained.
Exception.

Exhibit 95 offered in evidence.

Mr. Cregg: I object to it.
The Court: Sustained.
Exception.

To Mr. Hinman: The card that is attached to this suit here now on which Exhibit No. 95 has been marked by the stenographer, the tag is in Mr. Lacey's writing. When the merchandise which the Weed concern had bought came in there the bills or invoices came to me and are checked by me as part of my regular duties. From that I am able to say over what period of time these suits in this transfer lot 20040 were purchased; 1917, 1918, 1919. Exhibit 97 covers lot No. 38945, Count 4. There is no dispute but that this sale was made for $45.00 and that the cost price to the Company was $23.50 and it was sold to S. J. Nunn, Chenango
88 Street.

Q. When were the suits in that lot purchased?

Mr. Cregg: Does this witness know anything more about it than the record shows?
The Court: No.
Mr. Cregg: Then I object to it.
The Court: I will sustain the objection.

Q. Do you know about when the suits in that lot were purchased?

Objected to.
The Court: If she knows of her own knowledge she may state.

Q. Do you know?
A. In the spring of 1919. I didn't purchase them, I didn't have anything to do with the purchase.

The Court: Objection sustained.
Exception.

When this lot came in in No. 4, the invoice came to me.

Q. The invoice sent with the suits of clothes from the manufacturer or wholesaler from whom purchased?

Objected to; the invoice is the best evidence.
Sustained. Exception.

Q. Does your record there, the card of that lot, show from whom those suits were purchased in that lot?

Objected to as hearsay.
Sustained. Exception.

Card, Exhibit 97, for identification received in evidence.

"A. D. & Cohn" at the bottom of the card means from Alfred Decker and Cohn. I wrote that on there from the invoice. Card, Exhibit 99 for identification refers to lot 22050, the transaction involved in the sale to Perder, Count 5. The average cost of the suits in that transfer lot shown by Exhibit 99, is $17.82. Exhibit 4 is the sale to Perder described in Count 4, which shows the sale was made for $44.50.

89 Exhibit 99 offered and received in evidence.

To the Court: I didn't see this suit or have anything to do with the sale.

Mr. Hinman: I show you Exhibit 100 for identification and ask you whether that is one of the suits from lot 22050?

Objected to. Sustained. Exception.
Mr. Hinman: I move for the dismissal and quashing of Count 6 of the indictment.
The Court: Motion granted.

Card, Exhibit 101 for identification relates to the sale to A. M. Pierson, lot No. 30535, Count 7. It is a transfer lot. That lot number was assigned August 20, 1919. That number continued with that card.

To the Court: My records show that the suit was sold on that day. It does not state the transaction, it just states the suit was sold. I have nothing as to the selling price.

To Mr. Hinman: I am able to say that the suits represented in lot numbers 95825 and 16430, Exhibits 102 and 103 went in to make make up the transfer lot shown by Exhibit 101. The suits on the two cards, Exhibits 102 and 103 were put together to make lot 30535.

Q. Looking now at Exhibit 103, what was the cost price marked on that card?

Mr. Cregg: Is that the cost price on the card, 30535?
Mr. Hinman: No, that is on the card.

Mr. Cregg: I object to the cost price on the other card.
Sustained. Exception.

Mr. Hinman: I offer to show that the suits that went into this transfer lot 30535, mentioned in Count 7 were made up in part from suits from a former lot marked 16430 and which cost the Weed concern $13.26 instead of $11.78 as the average cost.

90 Q. Did you make the calculations as to this cost?
A. Yes.

Q. You calculated it to be what?

Mr. Cregg: $11.78 as set forth in the indictment.
The Court: This is the average?

Mr. Hinman: Yes.
Objected to. Objection sustained. Exception.

Q. Do you know whether or not this suit that is in question as sold to A. M. Pierson was a suit that was bought from Samuel Rosenthal?

Objected to unless she knows personally.
Sustained. Exception.

Exhibit 104 relates to the 8th Count of the indictment, the suit sold to Crary from lot 37960. That was an original lot.

Mr. Hinman: We offer the card in evidence.
Objected to. Sustained. Exception.
Mr. Hinman: I offer the suit in evidence; I haven't identified it but I can.
Objected to on the ground it isn't properly identified.
Sustained. Exception.

To the Court: I didn't have anything to do with the purchase of this suit.
To Mr. Hinman: Exhibit 105 for identification is an invoice from Alfred Decker & Cohn, dated November 13, 1919.
To the Court: That is the original bill from which I made the entry on the card, Exhibit 104 for identification.
To Mr. Hinman: The second item on the bill is the lot that I put on this card; that has the same lot number as the card.

Q. Looking at this invoice from Alfred Decker & Cohn, Exhibit 105——

91 The Court (interrupting): I understand there is no dispute about this price.
Mr. Hinman: I am asking about when it was bought by Weed; the invoice shows it was received at the store November 13th, 1919; but that wasn't when it was bought by Weed; generally speaking it was bought six months before.
Objected to.
The Court: The record shows it came to the store when?
Mr. Hinman: It was shipped November 13, 1919 from Chicago. The question I wanted to ask was when this was bought or ordered from Alfred Decker & Cohn.
Objected to on the ground that the witness don't know.
Sustained. Exception.

Thereupon the witness being cross-examined by counsel for the plaintiff, testified:

Mr. McDonough put all of the figures on the original sales ticket of the suit sold to Dr. Nunn January 9, 1920. He didn't put the cost price on the sales ticket as $12.10. That wasn't on the sales ticket. I recall Mr. Broderick being in the store. I don't remember what date it was. I didn't show Mr. Broderick any ledger account. I didn't see the ledger at all. I don't know that Dr. Nunn paid for the suit on March 2. I didn't give him the right cost on

that; it should have been $21.80. I recall Mr. Dolan coming in there March 11. I recall giving him the purchase price of that article as $12.10 and the selling price $40.00. I recall that Mr. Broderick came in there on April 3 and giving him the identical figures, $12.10 as the purchase price and $40.00 as the sales price. $12.10 does not represent the actual cost price of that article to the defendant; the actual cost price is $21.80. That is the average price that I figured up after putting the lot of suits in together. I didn't know at that time that we had suits that were purchased after
92 and for more money than I put into that item. I don't know anything about that. I don't know anything about whether or not the actual cost price of that article in the first instance to the defendant was $12.10. Mr. Gurdon Smith is at the store all the time. He is general manager. He goes in all the offices and looks over the work that I am doing. He does what work the general manager should do. I don't know all he does. I can't tell you what I see him do because I have so much work of my own to do. I have seen him talk to the managers of the different departments with reference to the stock. He doesn't come into my department frequently and talk with me about the prices of the articles and what they are being sold for, or what my records show; he looks over my work, he talks with me about it. My work shows the cost price of the articles and what they are marked for sale at. He looks over those books from time to time, but he doesn't talk with me about them. He just goes through the books. He has been doing that ever since I been there, six and a half years, so he has been the general manager familiar with that work all of that time. This is the original sales ticket of article 20040, made out by the salesman who sold the article. That was a charge account to Dr. Nunn. I put $12.10 on the first time that Mr. Dolan and the other gentleman was there. I got the figures from the record at that time on the card. That was incorrect. The other card that I have testified from here was not made out after Mr. Dolan was there; it was in the files before he was there. The old card was out. I took the old card out when it was closed. I kept my work up there daily. I was behind in some parts of my work. I kept my costs up to date.

Exhibit 96 offered and received in evidence.

Count I referred to several articles here as being marked—
93 the value was marked; the first article A900-12¾, the cost price was $7.25. I heard this gentleman from New York testify that that is what was actually paid for that article. I didn't say that that one was the average price. That was marked for sale at $12.75. That is what the clerks were supposed to get for that article before it was put on the desk, on the shelves for sale. That is what the clerks were instructed to get for it. That is true of every single item of Count 1, except on special sale. After that sale was closed on a certain date, then some articles were placed right back on the shelves at the original prices. From that time on the clerks were instructed to get the marked prices for those articles.

The witness was thereupon re-examined on direct by counsel for the defendants:

As to the articles referred to as wash goods and sweaters, I don't know what instructions were given to the clerks who had charge of those sales with reference to the prices they were to sell those for during the special sale. I don't know how long those continued on sale or whether they are on sale now.

Thereupon HERBERT T. STEINBERG was called as a witness for the defendants, being duly sworn and examined by Counsel for the defendants, testified:

I live at Chicago, Illinois. I am general manager for Alfred Decker & Cohn, makers of clothing.

To the Court: I have not seen these exhibits. I cannot tell their value by a casual examination. I could tell if I had the lot numbers and referred to some data I have in my pocket. I am familiar with the values of clothes in 1919. I have been in business eleven years. I know what the market values were at that time, October 1919.

94 Mr. Hinman: I offer to show by this witness the market value on October 22, 1919 of the articles of merchandise mentioned and described in subdivisions 22, 25 and 26 of Count 1 and in Counts 3, 4 and 8 of the indictment.

Objected to.

The Court: The market value of the particular item of articles wearing apparel on October 22, 1919. I will rule that this witness is competent to testify. I shall rule that it is not competent testimony relative to the issue.

Objection sustained. Exception.

Mr. Hinman: I offer to prove by this witness the same facts with reference to the various dates on which those items mentioned in the subdivisions and Counts before mentioned appear to have been sold, by the indictment.

The Court: The same ruling. Exception.

Mr. Hinman: Now I make the same offer of proof as to the remaining Counts, 2, 5 and 7 of the indictment.

The Court: The same ruling.

Exception.

Thereupon HARRY C. WALKER was called as a witness for the defendants and being examined by counsel testified:

I reside at Binghamton; have lived there all my life. Am a lawyer; have held public office, Mayor of the City of Binghamton for one year and Lieutenant Governor of this State for the last two years. I know Gurdon H. Smith of my city. Have known him a matter of fifteen or eighteen years. I know his general reputation

from the speech of people in the community where he lives. It is good. I know there is such a corporation as Weeds Inc. doing business in my city.

Q. Do you know the general reputation of that corporation from the speech of people?

Objected to. Sustained. Exception.

95 Thereupon LEROY E. BARNES was called as a witness in behalf of the defendants and being examined by Counsel, testified:

I have lived in Binghamton twenty-one years. I have been with the Ansco Company. I have held public office in the city of Binghamton,—President of the Common Council and Mayor the last year. I know the defendant Gurdon H. Smith. Have known him six or seven years. I know his general reputation in the community where he lives from the speech of people. It is good.

Thereupon being cross-examined by counsel for the plaintiff the witness testified:

I don't know what street he lives on. I don't know where he lives. I succeeded Lieutenant Governor Walker as Mayor I was not elected.

To the Court: I have heard the Superintendent of the Ansco Company speak about his reputation yesterday. I heard his reputation discussed before he was indicted. I confess I couldn't tell you by whom.

Thereupon THOMAS A. WILSON was called as a witness in behalf of the defendants and being examined by counsel testified:

I have lived in the city of Binghamton twenty-nine years. Am in the grain and insurance business. Am now Mayor of the City; have been since January 1. I have known Gurdon H. Smith ten or twelve years—seven years very intimately. I know where his place of business is. I have bought practically all of my clothes there for twelve years. I know Mr. Smith's general reputation from the speech of people in the community where he lives. It is excellent.

Being cross-examined by counsel for plaintiff, the witness testified:

I don't know that he supported me for Mayor.

96 Thereupon JAMES H. NELSON, a witness called in behalf of the defendants, being examined by counsel testified:

I have resided in the city of Binghamton twenty-five years. My business is real estate and insurance. I know the defendant Gurdon H. Smith—have known him for fifteen years. I know where he is engaged in business. I have known him in connection with business of that kind for ten years. Have traded at his store. I am one of the parties mentioned in this indictment as having bought

clothes there. I know Mr. Smith's general reputation from the speech of people in the community where he lives. It is excellent.

Thereupon WALTER B. DAYMON called as a witness in behalf of the defendants, testified:

I reside in Binghamton—am buyer and manager of boys' clothing, furnishings and hats. Am with Weeds, Inc. Have been employed there about nine years. My duties are making the retail prices and buying all the merchandise for that department. I have to do with other departments: men's furnishings and hats. Weeds is a clothing store devoted to men's furnishings and boys' clothing. It is not a general department store. Between twenty-nine and thirty-one clerks were employed there. It varies. I have been in the clothing business twenty years. The goods mentioned in Count 1 marked August 21, 1919 were bought in April 1919 by me.

To Mr. Cregg: That is the time they were contracted for in April. They were received at the store and paid for in August 1919. I make the markings of the selling price.

To the Court: I didn't do that after consultation with my Superintendent. I always marked all the goods, the boys' clothing that comes in and I watched the market and found out what they were worth at the time they came in. We always have
97 some system of marking except on a rising market. For instance this merchandise was bought in April and wasn't delivered until August. The same piece of merchandise in August was $9.50 wholesale. I marked it to offset the rise in that stuff which we would have to replace. I did add that on at that time. I didn't add it to the cost price. I added it on to the selling price to the customer.

To Mr. Hinman: I gave the marked sales price of $8.75 on that lot, transfer lot, an average cost of wash suits marked February 11, 1920, second item in Count 1. I gave it to Mr. Lacey and Miss McCarthy. Those goods represented in that number went into an alteration sale at that time, February 12.

To the Court: That is still continuing; some of the goods that are left are not exactly half price but another special price. We didn't offer them to the public at those prices, the markings showed the present value only.

To Mr. Hinman: The present value, market value at the time. I know what the market value of those goods were February 11, 1920, when I marked them.

Q. What the replacement cost would have been to Weed & Co.?

Objected to as immaterial.
Sustained. Exception.

As that lot of wash goods went on sale, instructions were given by me to the sales people in that department with reference to the price at which they were to be sold and I gave them the advertisements and had them placed on all the cases in the store. They were in the boys' clothing department. The clerks who were employed there at that time in the department were Miss Brown, Mrs. B——, Miss

Olloway, Mr. Elmer Gage. To indicate what the sale price of these goods were that went on sale in this alteration sale, they were placarded.

98 To the Court: I had a system of marking up prices, fixing prices to the consumer. I was the man that did that work.

Q. You had to make a profit of course?

Objected to. Overruled. Exception.

I had some method of calculating a profit. The entire store had a carrying charge. I have nothing to do with the apportioning of the charges. A portion of the carrying charges was put on to my department. I don't know exactly what that was. I know approximately. I don't know if my Superintendent ever told me what it was. That was an item that was necessary for me to know in order to make out the charging prices to the public.

Q. What was it as you understood it?

Same objection on the same grounds.
Overruled. Exception.

In the neighborhood of 29 to 32 per cent to my department. Boys' clothing is all in one department, boys' furnishings, boys' hats, play suits and numerous other articles. The store was divided into four departments at the time the investigation was made that I had charge of. In the entire store there were five departments. My department paid its share of the carrying cost of the business. The carrying cost of the business is approximately 29 to 32 per cent. I don't know whether that carrying cost takes in the salaries paid employees and rent and coal and interest on investment. I have never seen it stated or figured. That is my instruction from my employer, 29 to 32 per cent placed mainly on what I get from statistics and books and that sort of stuff, that is a general rule.

To Mr. Hinman: Percentages which I have given in response to the Court's interrogation are based on the selling price of the goods.

As to whether or not my department bore its just and exact
99 proportion of the expenses; it was proved in each year, that there were variations. As to boys' wash goods, such as have been exhibited and marked here in evidence with reference to their becoming soiled and mussed by handling, there is some depreciation in there. With reference to the styles of some of our goods, say hats for instance, they become decreased in value.

The Court:

Q. Will you look at these articles in Count 1, the cost price, the marked price, those increases there are approximately ninety per cent, are they not?

Objected to it unless it appears that he has figured them.
The Court: Let him state; he is used to those figures.

Exception.

The Court:

Q. That increase above the cost price or market price approximates ninety per cent, does it not?

Objected to. Overruled. Exception.

The Court:

Q. In addition to the cost price it is approximately ninety per cent?

A. It is there, yes.

Q. That is what the Government claims?

Objected to what the government claims as incompetent evidence. Overruled. Exception.

The Court: Look at Counts 2, 3, 4, 5, 7 and 8, at those figures, and see if it isn't a fact as to each one of those items the increase above the cost price to you and the actual selling price was something approximating ninety per cent?

Mr. Hinman: That is objected to as incompetent, improper immaterial, inadmissible, calling for a conclusion and let me
100 suggest if the Court is of the opinion that the District Attorney and myself are not conducting the case right I would like to know it.

The Court: I am trying to get information for the Court and jury.

Mr. Hinman: Exception.

A. I don't know about these because they are average costs on some of them, that is the reason I can't answer it correctly.

Q. In Counts 2, 3, 4, 5, 7 and 8 there are set forth specific sales of merchandise, wearing apparel; the cost price is given and the selling price is given; the testimony here is that those sales were actually made; I want to know if you are able to state whether those increases above cost price are approximately ninety per cent.

Mr. Hinman: That is objected to as immaterial, irrelevant and incompetent and no sufficient or proper foundation laid for the testimony; and there are other elements which should be justly taken into consideration than stated in the question.

Overruled. Exception.

A. About that.

To Mr. Hinman: The wash suits in the Second item of Count 1 were marked at lower prices in our alteration and half price sale.

Q. I show you Exhibit 15 for identification and ask you if that is one of the placards that was prepared and placed upon the counters where these wash suits in this second item of Count 1 of the indictment were placed on sale and were sold in the store after February 11th, 1920?

Objected to, incompetent, irrelevant and immaterial.

The Court:

Q. Are you able to state whether or not the prices which are fixed on this list I hand you as the marked cost price marked for sale was in fact fixed for the items and articles which are named there
101 and were exhibited in the store at those prices?

A. Not at those prices. They were marked with tags for showing value only; the real value of those suits. They were not offered for sale at those prices.

Mr. Hinman:

Q. Those figures, 8.75 on this particular item, all of the items, whether all of the items in count 1 of the indictment at the right hand column and under the title "cost price," "marked for sale," were the figures that were marked and placed on those various articles in the lot number, indicate the selling price except in cases where there were special or marked down sales or half price or alteration sales as the case might be; or what was there to that?

A. We put those lot numbers and prices on mainly to show the value of the suits at that time just as a selling price. On the card the marked for sale price indicated the selling price for the information of the clerks.

The Court: And customer?

A. Not always. The clerk had that as a guide to give to the customer.

To Mr. Hinman: That would always apply unless in cases where a special sale went on of the particular article covered in this indictment, Count 1, and when a special sale was put on the clerks were instructed as to the selling price of them and placards put up in the department. Before any special sale was put on with reference to any particular lot or class of goods, such sales were advertised in the newspapers. When a sale of that kind was put on, a special sale, alteration sale or half price sale, not only were the clerks instructed with reference to the prices at which they were to sell these articles, where there was a marked for sale price placards sometimes
102 and usually were put on the counters indicating the prices at which those articles were to be sold on those special sales.

On Exhibit 15 for identification, there is an item on there; the one next to the bottom covering this wash suit item with a marked for sale price of $8.75. The sales price marked on that is $4.38. That is the price at which the lot of wash suits numbered B 225875 described in the Second item of Count 1, marked sales price $8.75 went on sale February 11 and 12, 1920. Instructions given by me to the clerks in that department were to sell those wash suits with the marked sales price $8.75 at $4.38. They continued to sell those suits at that price for about two weeks then they were all gathered together and sorted out in two or three lots, placed together

and put on sale for $4.65; $7.75, $8.75 and $9.75 went on sale at $4.65.

Direct examination of the witness was suspended.

Thereupon JOHN J. IRVING, a witness called in behalf of the defendants, examined by counsel testified:

I have resided in Binghamton since 1884. Am a lawyer—have held public office, Supervisor several times and Mayor of the City twice. I have known Gurdon H. Smith the defendant twenty to twenty-five years and have known him in connection with the business that he has been in. I have traded there for several years. I know his general reputation in the community from the speech of people. It is good.

Thereupon the direct examination of the witness WALTER B. DAYMON was resumed.

None of the wash suits referred to in the second item of Count 1 in the indictment had been sold for $8.75. They had been sold for—offered for sale for—at half price and at $4.65. The third item in Count 1, boys' wash suits, B 225675 with a marked sales
103 price of $6.75 were also exhibited and referred to in Exhibit 15. They are the fourth item from the bottom. Those wash suits were put on sale in the same department as those in the third item and at the same time. The advertisements went in February 11, and the sale started February 12. After that sale at half price, these suits in the third item were sold at $3.65 and continued down to the present time since they closed out the half price sale. By alteration sale I mean the entire store was undergoing repair and alteration. Item 4 Count 1, Boys' wash suits B 225275, marked sales price $2.75, is on this placard the second item from the top. The selling price as marked on the card is $1.38. That item went into the alteration sale on February 12 at $1.38 just as shown on Exhibit 15 and continued during that sale at that price. When that sale closed they were placed together with the $3.75 range and offered for sale at $2.35. That continued on until recently. The wash suits in these various lots were bought by me at different times.

To the Court: Some in the fall of 1917; some in the spring of 1918, and some in the fall of 1918.

To Mr. Hinman: As to the sixth item of Count 1, marked "hosiery" the testimony of Miss McCarthy that it was boys' sweaters is correct. Those were marked with the sales price of $8.50. They went into the alteration sale and on a separate placard.

To the Court: Making sales prices and figuring them is my business.

The Court: Would you mind, between now and tomorrow morning figuring up the exact percentages of the increase of the cost price of the several articles named in counts 1 and 2, 3, 4 and 7 of the indictment, the percentage of increase, the marked price above the cost price?

To Mr. Hinman: I gave the percentage of the markings
104 above the cost, 29 to 32½ per cent. That was not on the cost price; on the retail or the selling price. That is equivalent to between 40 and 45 per cent on the cost price. That is an estimate. These boys' sweaters which the sixth item refers to instead of hosiery were in the same department as the wash suits and the same clerks had charge of that sale. When I made this sales mark on this lot of boys' sweaters at $8.50, the clerks were given instructions from the placards. Exhibit 106 is the first placard in connection with this special sale of sweaters. It is the third item from the top on this placard, Exhibit 106. They were placed on sale at $6.75 in that alteration sale and were offered for sale and sold at that price to my knowledge. When that sale was closed they were placed on sale at half price sale at $4.25; another placard was made for that. The clerks in that department were instructed accordingly and the ads from the paper were placed. Those sweaters were actually sold from that time on at half price. That half price has been lost. I am not able to produce that here. I know the placard was put on the counters. I purchased those sweaters referred to in the sixth item over a period of four years. Whatever remained and went into this lot of sweaters covered by the Sixth item had been carried in the store all of that time; some of them for four years and others a less time. We have no such lot as E 23½. We have lot D. That was Duofold Underwear.

Exhibit 106 offered and received in evidence.

Exhibit 38 for identification is one of the samples from that lot. Those goods were manufactured by the Duofold Underwear Company, Mohawk, N. Y. I didn't purchase them. I saw them in the store and am familiar with that make of underwear and have been for years. That exhibit of underwear shows manufacturer's style 622. That is a style that the Duofold Company was making, a lot number which they continued year after year. The 7th,
105 8th, 9th and 10th items refer to this Duofold underwear in different numbers. 622 is one number, the other is 724 I think. That is an article that is on general sale in first-class clothing houses throughout the country.

Q. The marking of item No. 8 was made July 17th, 1918, Miss McCarthy testified; can you tell me whether or not the Duofold Underwear Company, the manufacturer of these knit goods described in Nos. 7, 8, 9 and 10, sent out each year a printed list to the retailers handling their goods showing the wholesale and retail price of those goods?

Objected to as incompetent, irrelevant and immaterial.
Sustained. Exception.

Mr. Hinman: This was a standard article, if Your Honor please, sold in all clothing stores.

The Court: They are not complaining of your buying the article.

Mr. Hinman: This is one of the concerns that takes the pains

or precaution to send out to the people who buy their goods circulars giving not only the manufacturer's price for which they sold them but the prices at which the retailers are to sell them.

The Court: What has that got to do with it?

Mr. Hinman: I offer this for what it is worth.

I know the fact to be that Weeds' store received from time to time these price lists of the Duofold Health Underwear Company, of which Exhibit 107 is a sample. I am familiar with the prices charged for this Duofold Underwear in two stores that carried it in Binghamton during the years 1918, and 1919 and the present time.

Objected to.

Q. I will ask you whether or not the retail price charged by the retail dealers for these Duofold suits of Underwear, both two-piece garments and union suits, correspond as you have observed in these other stores with the retail prices marked in those price lists
106 that are sent out from time to time by the Duofold Health Underwear Company.

Objected to as incompetent, irrelevant and immaterial.
Sustained. Exception.

Q. I show you Exhibit No. 108 for identification and ask you if that is another one of those printed lists sent out by the Duofold Health Underwear Company and which was received by Weed & Company in the summer of 1919 and which on its face is effective August 1st, 1919?

Objected to as incompetent, irrelevant and immaterial.
Sustained. Exception.

Exhibits 107 and 108, only the portion thereof relating to lot Nos. 622 and 724 that the witness has described offered in evidence.

Objected to as incompetent, irrelevant and immaterial.
Sustained. Exception.

The shirts referred to in the 11th item of Count 1 were all bought prior to my taking charge of that department. They didn't go into any marked down sale that I know of. I took charge of that department I think it was April 28, 1919. Those shirts were already in that department having been purchased before. The lot number S 72 was on that lot at the time and remained there. I purchased lot No. S 2–165, shirts, 12th item of Count 1, in May, 1919. I bought some of the shirts lot S 1–5, 13th item. Some were in there when I took charge. Those that I bought I bought them in May, 1919. Mr. Gaffney purchased the shirts S 1–15, the 14th item. They were in the department before I took charge of it. That same marked selling price remained during the entire time since then. That was a silk shirt. I purchased part and Mr. Gaffney the balance of the 15th item, S 93. Those he purchased were there

when I took charge. They had been purchased some time
107 before but I don't know just when. The mark was on there when I took charge and remained there right down to date. I purchased the 16th item, silk shirts.

Q. What will you say about the elements that enter into the marking price or marked sales price of silk shirts of that kind?

Objected to. Objection sustained. Exception.

Silk shirts in general always muss up—they are on the counters and are being handled by prospective purchasers. The 17th item is a lot of silk shirts purchased by me. The old lot was closed out by that number and the ones we have in stock were purchased by me later in May, 1919, but bought under that same lot number and have continued with that marked price for sale right straight down. I purchased the hats lot No. Z 1–18, the 18th item, of Bill & Caldwell, New York City. In buying hats in dozen lots the sizes are always standardized, running from size 6¾ to 7⅜ or size 6⅞ to 7½. This particular item was an imported hat. I think I bought three dozen in that lot; about half a dozen have been sold.

Q. For what season wear was that hat?

Objected to as immaterial.
Sustained. Exception.

That is a lot of hats where the balance not sold during the season for which they were fitted carried over until a year hence.

To the Court: They might go out of style and we would have to have them reblocked at a cost of $18.00 to $24.00 a dozen.

To Mr. Hinman:

Q. What items of expense enter into the retailing or selling of a hat, speaking generally.

Objected to.

The Court: Is that all figured into the expense of carrying the business?

108 A. Well hats cost more to sell. It is charged against the department—it is a separate expense. It is charged up against the hat department, yes, sir.

Mr. Hinman:

Q. The particular thing I want to get at is this, are there articles, and is this item of hats one of them, in which the cost of selling is greater than would be with some other articles of clothing or furnishings?

Objected to.

The Court: Requires more care and attention?

A. It does; hats generally require more attention because they get out of shape by laying on the counters, customers trying them

on, the sweat bands get soiled and in general the stiff hats being out of shape; the middle sizes are generally sold out and we are left with small and large sizes.

Q. State whether or not so far as you have observed, it is the general custom of clothing merchants or gents furnishings retailers to mark a larger percentage on the sales price over the cost than on other lines or some other lines of goods for the reasons that you have stated?

Objected to. Sustained. Exception.

The Court: You can show anything you want to as to calculations made by this Company as to cost of doing business.

Mr. Hinman: This evidence is offered in connection with the item of hats and also it is offered in connection with some other items to show that the marking sales price in some lines of goods—some articles are higher than others because of the extra expense of selling those particular articles.

The Court: In the first instance tell us what you did mark off. It is excluded.

Exception.

Q. Do you know the prices at which these Bill & Caldwell
109 imported velour hats of the kind and quality stated in this 18th item of Count 1 are sold by merchants generally, whether there is a general or uniform price on that hat?

Objected to. Sustained. Exception.

Mr. Hinman: I make the same offer with reference to lot of hats described in the 19th item.

Same objection. Excluded. Exception.

I bought those hats in that 19th item in August 1919 and gave them the selling marked price. I don't remember the date they came in. Am not sure about the time they were bought. My best recollection would be August or September 1919.

To Mr. Cregg: They were received in the store in October. That is the time they were marked and placed on sale.

To Mr. Hinman: That is a winter hat, a Borsalini hat. It is a fall hat. I don't recall how many of them we still have on hand.

Mr. Cregg: I object to this evidence.

Sustained. Exception.

The 20th item might be a Dunlap or a Stetson hat. They are both in that lot.

Q. The Dunlap & Stetson hat, do you know what the rule is with reference to the price of that hat, retailing price generally throughout the country?

Objected to. Sustained. Exception.

Mr. Hinman: I offer to show that this item, that the Dunlap & Stetson hat are a hat generally sold in this class of stores and has a uniform retail price everywhere.

Objected to. Excluded. Exception.

I am familiar with that one cap in stock.

Q. What was the market value of that one cap on October 22, 1919?

110 Objected to. Sustained. Exception.

Thereupon upon cross examination by counsel for the plaintiff the witness testified:

I am a member of the firm since January 1st, 1920. I have a regular salary; not a percentage on the business of the department. In a business way I talk with Gurdon H. Smith with reference to the conduct of my departments; very seldom in reference to the stock, not in regard to the profits on them. We talk in regard to how much business we are doing &c. and whether the department is successful. In a sense I mean by that how much profit it is making. I thought you were pertaining to profit marking. I didn't know what you were referring to. We talk about advertising. I generally conduct the sales myself. Sometimes I talk to the general manager whether we will have sales or not; not always. I talked with him about this alteration sale and about the stock of goods on hand. We placed all of our goods on sale. In the boys' clothing department we did put the sales on. There were no sales on those goods in the other department. No sales on underwear except for 25 per cent. reduction we had one or two weeks on the alteration sale. There were sales on sweaters. I did intend to get $12.75 when I marked the boys' suits that were purchased for $7.25 and placed it in that particular department to sell at that price. The clerks were instructed to get that price. That is not true in reference to the next item. Wash suits B 225875 were purchased over a period of three or four years. The last purchase was about 1918. They didn't come in until the spring of 1919. In 1919 when they came in I placed them on sale several times. They were not actually on sale in the store before the alteration sale at these particular prices. There was a time when they were marked $8.75, just the day before they were placed on sale. I never
111 intended to get $8.75 for it. I meant to convey to the prospective purchaser that it was actually worth $8.75, but would sell it for much less. I didn't mean to convey to that prospective purchaser that that article had been selling for $8.75. I did put it in there as a marked down sale. By putting $8.75 on this side of the card and $4.38 on the other, I meant to show them the marked value of that article; showing them a marked down sale and the value of the garment. I meant to convey that we were having a marked down sale on that day from $8.75 to $4.38. I meant to convey the market value of that only. I intended to mark it to show a mark down from that—a marked down price to the prospective purchaser.

To the Court: I understand the market value is the price of replacement of that article at the time we placed it on sale; what it is worth wholesale—the value of it in the wholesale market.

To Mr. Cregg: We didn't tell them that this article marked $8.75 on the left hand side of this card was actually worth at wholesale $8.75. The figures meant the actual wholesale price of the article. $8.75 was the wholesale market value of these garments at the time. That is what this card was prepared for; with that in view. I was indicating to the prospective purchaser that he was getting the article at about half the wholesale market value and at about one quarter of the retail value. I know generally what a mark-up on a garment is. When we pay $7.25 and mark it $12.75, the difference between the two is the mark-up. I don't know what salary Gurdon H. Smith is drawing. I am a member of the firm. I don't know he is drawing $10,000 a year; I don't know all of the items that go into this carrying charge I have spoken about.

112 Q. Don't you know some of them?

Objected to as improper cross examination.
Overruled. Exception.

The salaries of the officers go into these carrying charges. I call it overhead expense. I never investigated what salaries the officers were getting. I don't know. I have no information about it at all recently.

Q. Don't you know that Mr. Weed is drawing $10,000 a year?

Objected to as improper subject of cross-examination, incompetent and immaterial.
Overruled. Exception.

A. I don't know.

Q. Don't you know that Mr. Gurdon H. Smith is drawing $10,000 a year?

Objected to on the same grounds.
Overruled. Exception.

A. I don't know. This sale I have spoken of continued two weeks or more. I placed every article of wash suits that we had in that department on sale. There were no other wash suits on the floor at the time. There was no new merchandise that came in that was in on the shelf. Some of the articles that we placed on sale had been left over for a period of four years and some had been handled over and some got soiled, more or less. We placed them on sale and advertised in the papers. I suppose that is one of the means of advertising—getting people to come to the store.

Q. The advertising is considered as part of your overhead expense, isn't it?

Objected to on the same grounds, improper subject of cross-examination, incompetent and improper.
Overruled. Exception.

113 We placed these different garments on the tables and put placards on the tables. We had no new wash suits on our shelves. There were some in the store that were not unpacked. We

couldn't put the new on the shelves because we were having an alteration sale and they would be soiled at once. Some of the articles got soiled because of the alterations and that was part of the cause of the sale. In the first instance they were all marked as set forth in Count 1 at the prices mentioned here.

Thereupon the witness being re-examined by counsel for the defendants testified:

I am a director of the corporation—not a stockholder. I have no financial interest in it. I am just a director. In any event, whether or not there is one share of stock standing in my name I have no financial interest in the Company.

Thereupon being recross-examined by counsel for the plaintiff the witness testified:

I mentioned hats being standardized in sizes—those are the sizes they figure out to get the amount of merchandise according to the sizes and according to the amount of material they use in the sizes to give you those articles at a stated dozen price. There is much difference in the amount of material used in a hat. That is what the manufacturer figures on in sending out those sizes.

Thereupon CHARLOTTE BROWN, a witness called in behalf of the defendants and examined by counsel, testified: I am employed in Weeds' store in Binghamton in the suits department. Have been working there about seven and a half years. In February and March 1920 I was employed in the children's department. My number was number 6. Those sales slips included in Exhibit No. 9
that are marked "6" represent sales slips that were made out
114 by me and in my handwriting. They represent the sales of wash suits in lot B 225875. The dates indicated at the top of those sales slips represent those sales. The price for which those suits were sold is opposite the figures in the right-hand column. The first one is February 12, 1920. That sales slip represents sales that were made by the clerk having that number there on that date. The $4.38 represents the sale of a wash suit, the price at which it was sold by the clerk to the customer. As far as I knew those sales slips, Exhibit 9 for identification include all the sales made from our department during the period covered by those sales tickets from lot No. B 225675. Those sales slips also represent articles sold in that department during that period but having other articles on them. So far as I recall I was there during the period of time between February 12 and April 9, 1920 each working day discharging my duties as a sales clerk in that department. During that period of time I didn't see any of those wash suits in lot B 225875 sold for more than $4.38 or $4.65.

The Court: Mr. Cregg, are you willing to have stricken out all of these goods that went into this alteration sale?

Mr. Cregg: For the purpose of facilitating the trial, I am willing that all be stricken out included in the alteration sale.

Exhibit 17 for identification are sales slips of wash suits sold at half price. They refer to lot B 225675.

Exhibit 17 offered and received in evidence.

While I was there the wash suits in lot B 225675 were sold for $3.38, the half price, and then $3.65; so far as I observed or did myself. I remember the lot number B 225275, boys' wash suits. They were put on half price sale and alteration sale and I sold them.

To my personal knowledge they were sold at half price. I
115 also had for sale in our department boys' sweaters. I had charge of the sale in our department of boys' sweaters, lot number D 1850. Those were put on sale in the half price sale at $4.25 and sold by me at that price. Mr. Daymon so instructed me to sell them and I followed his instructions. So far as I observed the other clerks in that department followed those instructions. I was there in the store in our department when the Government inspectors appeared. I didn't learn the name of either of them. They came to our department and asked for information concerning our department. I gave whatever information they asked so far as I was able to and gave it to them as it was. They took different lot numbers there that day. We didn't have on any of the goods there the cost mark. I didn't know there that day the cost mark of the goods we were selling or the actual cost of them. There was nothing on the goods that gave the cost mark. At the time when the two men were there on this first occasion there were on the counters placards showing the sales price of these knit goods and sweaters.

Thereupon the witness being cross-examined by counsel for the plaintiff, testified: I gave the inspectors some figures on different articles: the prices that were marked. I gave them the lot numbers and on some of them, not all of them, the marked for sale prices appeared. The figures I saw them taking were not the prices. They took the numbers of wash suits. We had wash goods on the shelf that we were selling at different prices than those on the tables.

Q. Was there any sale on the 11th of March or the 3d of April?

A. There wasn't marked.

Q. Will you say there was a single placard on the tables on
116 the 11th of March when the inspectors were in the store?

A. There was.

To the Court: The Government men were there the first part of March. I am certain the placard was there on the 11th of March because we had sales during all that time and we had cards on during the sales. The half price sale started February 12. It continued all of two weeks; then we had another price on the wash suits which started right after the half price sale. That is still continuing.

To Mr. Cregg: I mean to say that we have these placards, similar placards upon the table now.

To the Court: I didn't give the Government officer- the price of wash suits; I gave them the lot number. I didn't give them any prices.

To Mr. Cregg: I didn't call their attention to the fact that we were

having a special sale. I knew what they were there for; I knew they were Government men inspecting the store and that they wanted the cost price and marked for sale price. I didn't call their attention to any special sale. I now say we did have a special sale.

Thereupon the witness being re-examined by counsel for the defendants testified:

I gave these inspectors the information—answered correctly questions they asked me. I took no part in their investigation except to give them what information they asked for.

Thereupon LOUIS M. MCDONOUGH, a witness called by the defendants, examined by counsel testified as follows:

I am employed by Weeds Inc. Have been employed in Weeds' store in Binghamton between nine and ten years as salesman in the men's clothing department. I was there in that capacity in 1919 and up to the present time in 1920. The written portions of
117 Exhibit 90 are in my handwriting. That is a sales slip that we use in making out sales. My number was 7. Exhibit 90 represents a sale of a suit of clothes to J. H. Nelson on January 8th, 1920. The figures 38040 represent the lot number of that suit of clothes.

Exhibit 90 offered and received in evidence. (Here set forth the same.)

Exhibit 91 is the suit that was sold by me to Mr. Nelson on the date indicated on Exhibit 90. After this indictment was found I got that suit from Nelson myself for the purposes of this trial. I asked him for the loan of the suit.

Exhibit 91 offered and received in evidence. (The original Exhibit to be produced before the Court.)

That is the same Nelson who was sworn here in Court yesterday.

The Court: What do you want to prove by this witness?

Mr. Hinman: I want to identify by this witness the suit; he is the one that traced them to the sale; and when Mr. Smith is on I can take the suits and show them.

The Court: They are all in evidence already; identification isn't necessary; they are in evidence as those sales.

Mr. Hinman: It isn't quite checked up; however, we will get along with that. There have been offered in evidence here certain suits of clothes, being the suits mentioned in counts one, and two; this suit (indicating) is one. Three, four, five, seven and eight.

I myself obtained those suits from the purchasers with the exception of the Pierson suit and he brought that into the store.

To the Court: Those suits have been brought in Court and put in evidence.

To Mr. Hinman: I went to the purchasers and requested
118 the loan of them so we could use them in Court. Sales slip, Exhibit 96 represents the suit I sold to Dr. S. J. Nunn. I sold Dr. Nunn three suits on that day. They were from the lots shown on that sales slip. Dr. Nunn took away one suit. Before that was taken away it had to be fitted—altered. Weeds' store has a department in which tailors are employed just to do that work. Dr. Nunn didn't take the other two suits.

Q. State what was said with reference to that by Dr. Nunn to you?

Objected to as immaterial.
Objection sustained. Exception.

They were left there for him to come in later and have them fitted to him. I believe those suits are here in Court, but they have been at Weeds' until brought here.

Exhibit 96 offered and received in evidence. (Here set forth the same.)

It was thereupon conceded that sales slip Exhibit 96 covers the suits—the one in Count 4 and the indictment also.

Exhibit 109 for identification is a sales slip in my handwriting for the sale to B. Perder or B. Pender on January 31, 1920 of a suit from lot number 22050.

Exhibit 109 offered and received in evidence.

Exhibit 110 for identification is not in my handwriting. Mr. Ray was clerk No. 10. Exhibit 111 for identification is in my handwriting and represents a sale by me on March 3, 1920, to the son of T. B. Crary of a suit from lot 35960.

Exhibit 111 offered and received in evidence.

Thereupon the witness being cross-examined by counsel for the plaintiff testified:

119 The figures "20" on Exhibit 96 were put on I believe by Miss McCarthy—not by me. All I put on there was the selling price. There was no mark on the garment showing to me the cost price of it; simply the marked for sale price on the garment. That is the system in the Weeds' store; so that the clerks don't know what the garment costs. They simply have the marked for sale price on and that is the price at which they are to sell the garment.

Thereupon the witness being re-examined by counsel for the defendants, testified:

When special sales are put on at reduced prices the clerks follow the price for the special sale.

Thereupon the witness being further cross-examined by counsel for the plaintiff, testified:

When one of these placards is used then there is a marked for sale price on that special sale placed on this table w-ere the articles for the special sale and the clerk must get the price marked for sale on the placard over the table. That is a system that applies to these special sales.

Thereupon HELEN E. CARY, a witness called by the defendants examined by counsel, testified:

I am bookkeeper in the Weeds' store and have been since February 6, 1920. The bookkeeper who had been there up to that time left to have an operation and died a month after the time she left. I was there when these two Government inspectors came and saw them. I didn't take them to any of the other clerks in the store. I didn't show them, or either of them, any of the cost prices on the goods or marked prices. I didn't give either of those inspectors any cost prices or marked prices. I was there when Mr. Broderick came to the store. He asked some questions but he didn't ex-
120 amine the books himself. He asked for information from the ledger; that information was given him. I answered one question and Mrs. Merriman answered the others. She is the one that has charge of the ledger accounts.

Thereupon EULETA MCCARTHY recalled by the defendants examined by counsel, testified:

Mr. Broderick asked for sales slips. I got them for him. Slips from the first to the 15th of March. All the sales slips—each day's business, is put up by itself. Approximately a hundred sales each day.

To the Court: And he selected just these few.

To Mr. Hinman: I laid them right out before him so he was examining them.

To the Court: I did not examine the others. They were all together. I was busy with something else. I don't know how they compared with the slips he took as to the increase of cost price.

To Mr. Hinman: The cost price is never marked on the original sales slips as they come to me.

The Court: It is conceded that she gave that or marked it on the copies which Mr. Broderick made. She testified she put those marks on there.

Paper marked Exhibit 112 for identification.

The written portions of Exhibits 112, 4, 3, 2 and 5 are not in my handwriting.

To the Court: I didn't put the cost price on. My initials are on. I gave the cost price to Broderick correctly taking those cost prices from the cards. After Mr. Broderick was there at Mr. Smith's request I wrote on the original of which these five exhibits are copies, the cost price, but the originals of these slips as they are on my files there don't have the cost price even marked on them.

121 Thereupon GURDON H. SMITH, a witness called in behalf of the defendants, examined by counsel testified:

I am one of the defendants, a son-in-law to Charles A. Weed. I live at 76 Riverside Drive, Binghamton, N. Y. Weeds', Inc., was incorporated January 1st, 1920. I am Secretary, Treasurer and Manager. Have been connected with Weeds' store ten years, and have been familiar with the business of that concern for some time. During the years 1919 and 1920 Mr. Daymon was buyer of the children's department and of the men's furnishings and hats. He was absolutely in charge of those departments. He bought in the stores and also went to other cities to buy. The total sales in that store during the year 1919 were about $330,000.00. The total expense of making those sales in 1919 were approximately $90,000.00.

Q. What was the total net profit in that business in the year 1919?

Objected to in present form.

Overruled.

By the Court:

Q. Have you a balance sheet that shows this or are you taking this from memory?

To Mr. Hinman: I know of my own knowledge.

To the Court: I don't personally keep books. The concern keeps books. They are in Binghamton still in existence.

To Mr. Hinman: I know of my own knowledge what the net profits of that business were in 1919.

To the Court: I don't personally keep books.

Q. Well, the information you have is what you have obtained from the books?

A. Yes, sir.

Objected to as not the best evidence.

122 The Court: How are you going to prove that? That is the most important thing in this case from your viewpoint?

Mr. Hinman: Our viewpoint.

The Court: I would think so.

Mr. Hinman: I submit, a man who knows and is there——

The Court: He doesn't keep the books; he does keep a system of books. He has managers who have charge of departments and the only information he gets is what he gets as a result of looking at his books. Nobody vouching for the accuracy of those books, when every entry was made, every charge put on, and so on.

Mr. Hinman: It is not possible to prove it in that way, because the bookkeeper is dead; there is no way we can prove the absolute accuracy of any books.

The Court: The books themselves.

Mr. Hinman: Books in his own favor do not prove anything, and he couldn't use them in his own favor; the bookkeeper would have to testify to that and the managers.

The Court: You are wrong about that. But, assuming you are right, that contention would apply doubly strong to what the witness is trying to testify to.

Mr. Cregg: He is simply trying to testify to something he saw in the books, some calculation he saw in the books.

To the Court: I didn't at any time in 1919 of my own effort keep any method of calculating our profits. I am able to state from personal knowledge of my own what our profits were in 1919 from the results—not the actual figuring; I mean from the figures obtained from the books.

To Mr. Hinman: I am able to state what those profits were; from the result of records kept by the bookkeeper, that is the only information I have and all I am able to get.

123 Objected to as not within the knowledge of the witness and not the best evidence.

To the Court: These books are still in existence.

The Court: Why don't you produce the books, Senator?

Mr. Hinman: Your Honor please, I didn't suppose the books were necessary; I assumed he would be able, as treasurer of this concern and as the man in charge of handling it, to testify as to what he knows about the business.

The Court: If he showed a personal knowledge of it, but he doesn't.

Mr. Hinman: The Government inspectors were there and were told they could see anything and everything they wanted.

The Court: That is not the test; that has nothing to do with it. I am obliged to sustain the objection and I dislike very much to do it.

Exception to defendants.

To Mr. Hinman: During 1919 I handled the moneys there and knew what the divisions of the profits were at the end of the year personally. Outside of the bookkeeping part of it, I knew the results.

Q. Do you know what the total net profits in 1919 were?

Objected to as incompetent, irrelevant, immaterial.

The Court: I feel constrained to sustain the objection.

Exception.

Weeds' store was started originally about 1867, and has been located at the same place in Binghamton ever since. Weeds' store has not at any time been a member of any clothing or mercantile association. There are quite a number of other clothing or gents' furnishings in Binghamton. There were in Binghamton during 1919 and there are at the present time perhaps twelve or fifteen stores handling gents' furnishings and clothing entirely besides Weeds. There is

124 no concert of action or organization between these clothing merchants.

To the Court: No combination of stores.

To Mr. Hinman: We carry principally high-class merchandise. The merchandise we carry there is not the highest priced because we try to carry merchandise to cover the whole field—the needs of our

customers, both expensive and less expensive stock. The makers' names are Stein-Bloch Company of Rochester, Alfred Decker and Cohn, Chicago. To meet the needs of the men of moderate means we carry clothing in known brands, Monroe clothing and Ford overcoats. We give the very best possible service. Our clothes are made to fit the custom before they leave the store, no matter to what expense to us. Weeds is a one-price store and has been ever since I knew it and from the start of it so far as I know. The store maintains and has maintained for years a department devoted exclusively to remodeling clothes and fitting customers. We call that the Busheling department. From three to five or six people are employed in that department the year around. Never less than three. This concern stands behind the quality of the goods that are sold there. Speaking generally I fixed the selling price on the clothing and speaking generally Mr. Daymon fixed the selling price on the merchandise that is described in the first Count of this indictment, outside of the four or five items of clothing that are in it.

To the Court: Speaking specifically, Mr. Daymon fixed the price on the particular items contained on this page of the paper shown me except the clothing which I fixed. Mr. Daymon was department manager. Mr. Weed takes care of the office and financial end of the business. He is located at Binghamton. He and I run the store together. The stockholders are Mr. Weed and Mrs. Smith, Mr. C. W. Weed (Mr. Weed's son) Mr. Daymon and myself. Mr.
125 Daymon is a stockholder and director. Mr. Weed and I run the affairs of the Company. Mr. Daymon runs his department.

To Mr. Hinman: There are five directors.

To the Court: The prices Mr. Daymon fixed are proved by me generally although he has carte blanche to run those departments. I have that confidence in him and so approve what he does. If there is anything that meets my disapproval I say so.

To Mr. Hinman: My. Daymon owns one share of stock simply to qualify him as a director.

To the Court: I own one share.

To Mr. Hinman: Until January 1st, Charles A. Weed was the owner of the store and conducted it. I had direct charge of the management of it but it was Charles A. Weed's individual store conducted under the old firm name that he and his father had, C. A. Weed & Company.

To the Court: This present Company has no branches.

To Mr. Hinman: There is a difference in the expense of merchandising different articles or different kinds of merchandise in the store, that is, the expense of carrying them and merchandising them is greater than others. Some of the articles on which the expense is higher than others are clothing for one thing, because there is so much expense to the alteration of the garments, various other things. The percentage of expense of running the business, percentage on the volume varies from 28 to 31 or 32 per cent on the selling price of the merchandise on the volume of the business. I would like to qualify that from 27 to 32 per cent.

To Mr. Ducey: On the turnover.

To Mr. Hinman: Those are the figures as they have run in our store as I have observed it varying from the lowest figure of percentage up to the highest figure.

126 To the Court: Our balance sheet shows the percentages, the exact percentage.

By Mr. Hinman:

Q. Now, in answer to the Court's inquiry—well, I will put my own. Give the other articles of merchandise in the store in which the cost of merchandising is higher than others?

The Court: What difference does that make? They get a total, as he has just told us; some may run down to ten per cent, some may go as high as fifty per cent; I suppose he strikes an average.

Mr. Hinman: Some may go higher than fifty; that is what I want to get out. These figures differ——

The Court: He is only interested in the net result.

Mr. Hinman: That isn't what we are indicted for.

The Court: Yes, you are indicted for just this.

Mr. Hinman: No, we are indicted here as these counts read for a marked price on a particular lot of goods; we are not indicted here for exacting unreasonable or unjust profits as a whole. The government has seen fit, after going through this store, from spending about two hours and a half on one occasion and several hours on other occasions, spending half a day with these inspectors, the whole store thrown open, they have selected a few specific items, and we are indicted for making unjust and unreasonable charges on those specific items out of thousands and thousands.

The Court: It might appear, then, that you were perfectly just and fair with reference to other items, but with these you were unjust and unfair.

Mr. Hinman: Yes, they have selected items on which the charges are excessive; and what he has given are averages. Now, I want to show by him the reason for charging the higher selling price

127 for some than others and the elements which enter into a charge to make it absolutely necessary that a merchant——

The Court: Men don't do business that way, Senator. That is his method of doing business. He finds what the percentage is from his balance sheet.

Mr. Hinman: I want to take an exception to that. He hasn't stated that is it. To get that general average you have got to get the highest and lowest; and these items they charge us with have been selected by the government, and nothing said about those where the markings are low.

The Court: They may not have been low. I just put the case that way.

Mr. Hinman: That is the fact.

The Court: You don't know, neither do I.

Mr. Hinman: The point is the question involved here——

The Court: Go on, I will let you ask it.

To the Court: We have some well defined method as to fixing charges. The selling price is based to start with on our average or on our last season's costs of operating.

Q. Go on?

A. The basis that we figure on; that is the basis we use to figure our mark ups, which—do you want me to be specific?

By Mr. Hinman:

Q. Yes, go right along and give the whole explanation of how you conduct your business, in your own way, so the Court and jury can see just what your methods are, and give a full and detailed statement of it as the Court asks.

A. Taking this as a basis the merchandise as received is marked to show us what we would consider a fair return. For instance, based on a percentage of 27½ or 28 per cent we would mark our merchandise from 35 to 37 per cent. This would take care of losses where we take in stuff being—having to be sold at greatly reduced prices, some of it below cost; returned merchandise, which we have to make good to the customer, and which we do make good to the customer in every instance. We have no absolute way of determining what this is going to be; the only thing we can do is to get as near as possible the average on it because it relates to the future that is entirely speculative. There is no way that we can determine in advance what the result of a year's business will be.

Mr. Hinman: Let me note an exception to the remark that everybody does business in a certain way.

The Court: I said everybody knows that.

128 Mr. Hinman: I am referring back to the statement on the percentages; on the ground that we are indicted here for what we did, and only responsible for what we did in our store.

To Mr. Hinman: There are instances where the margin is lower and instances when they are higher. The figures I am using are average percentages on seasonable merchandise.

To the Court: In fixing the cost of doing business at 27 to 32 per cent I include the total expenses of the store; interest on our investment, rental, salaries of employees, depreciation. It is the entire expenses of the business but it does not include interest on the investment. The corporation has only been in existence since January 1st. It includes every expense known to the directors.

To Mr. Hinman: It does not include anything for depreciation.

To the Court: Except that we take a depreciation on our fixtures of a certain percentage a year, practically 10 per cent. In Count 1, 22d item, we make a charge of $60.00 for a suit of clothes. The cost price is fixed at $30.50 actual cost. The mark-up price of that wearing apparel is about one hundred per cent on the cost, but our mark-up is all based on the retail and not on the cost because all percentages are figured—I call that a mark-up. Based on 28 per cent for a suit of clothes sold for $60.00 our expense on that would be $16.80, based on the selling price. I am familiar with the custom

and practice that exists in the trade other than in our own business. As to whether the percentage of expense is charged against the selling price or cost price in every instance, that I know in our line of business; it is charged against the sales price, the actual turnover.

To the Court: I don't know in our particular line of business of any that charge it up on the cost price, although they may do it.

To Mr. Hinman: The percentages that I have given of 27
129 or 28 to 31 or 32 per cent are percentages on the selling price of the article and not on the cost. Reduced to concrete figures, 30 per cent on the selling price of an article would be equivalent in rough figures to 43 to 45 per cent on the cost; 33⅓ per cent is exactly 50.

To the Court: I said the expense of our business in 1919 was approximately $90,000.00. We paid $12,000.00 rent in 1919. The salary of the officers was approximately $14,000.00; I think $14,400.00 and something are the exact figures.

To Mr. Hinman: I have here some figures prepared by the bookkeeper that gives these items.

Mr. Hinman: Of course those are not competent; if you are willing to refer to them he can give you those items exactly, if you want them.

The Court: Yes.

To the Court: We don't pay taxes on the building. I couldn't give you offhand what we pay for advertising. I think last year it was somewhere around $9,000.00.

Q. Is there any other item that goes to make up your expense that you think of that I haven't mentioned?

A. Every item of conducting the business in the store.

To Mr. Hinman: The items as far as I can give are salaries, both executive and the people in the store, light, heat.

To the Court: I can't tell you what the heating cost—advertising, insurance. I don't know what the insurance is; and other items that I can't recall.

To Mr. Hinman: Exhibit 113 for identification is a paper that has been prepared at my suggestion by our bookkeeper, Mr. J. B. Hein, giving the total items of expenses for 1919. Mr. Hein has had charge of our bookkeeping since the death of Miss Washburn,
130 who for many years was our bookkeeper.

To the Court: He is in Court.

To Mr. Hinman: Using that I can give the items that went in to make up that total expense.

Mr. Cregg: I object to the witness using that. The books from which that was taken are now in the possession of the defendant.

Witness: They are, in Binghamton.

The Court: Do you object to it?

Mr. Cregg: I do. I think we should have the books.

Objection sustained. Exception.

To Mr. Hinman: Under the conditions existing there in our store, the class of goods which require and are given a larger percentage than other goods are those which are subject to change in style—clothing as I have mentioned—hats on which there is a big expense attached to the selling white goods in the children's department, wash goods, children's hats, clothing requires a larger percentage on the total sales for merchandising than collars and cuffs and articles of that kind because of busheling principally; we have small and large sizes left at the end of the season, styles which have not sold; patterns which are not good which we have to reduce—sometimes sell them much below cost. Styles change quite shortly, both in men's clothes and in children's particularly. As to hats, the same item as to sizes. We are left with small and large sizes on our hands which eventually have to be reduced to prices greatly less than the cost price. Children's clothes and men's clothing are made for seasons. Styles change with seasons. Winter clothing not sold during the fall and winter is usually put in the reserve stock and carried over. The summer goods in clothing that we have at the end of the summer is usualiy the same thing, put into reserve
131 stock. It is necessary to charge a larger percentage for expense of merchandising and for profits on hats than on some other goods for the reasons I have stated to you; middle sizes with lots selling out, leaving us with the ends; cost of reblocking when the styles change, new sweat bands if they get soiled and lettering of the hat if called for by the customer. The percentages necessary to cover the expense of merchandising silk shirts must be much larger than on cotton shirts because they are more easily soiled. When soiled they are practically worthless. We have in the store merchandise in which the styles don't change frequently; as to that class of goods they require a less percentage for selling than these other articles that I have mentioned. The salaries of the executives in 1919 aggregated $14,400.00. The salaries paid the executives at the present time are at the rate of $20,000.00 a year. By executives I include myself and Mr. C. A. Weed, the President. The salaries of the clerks are not included. The Company does not charge off anything for depreciation at the end of the year except on fixtures and bad accounts. Weeds now and during my experience with it from time to time have put on special sales and advertised special sales. It is a concern which advertises extensively. We spend approximately $9,000 a year for advertising. With reference to stock that has got out of style; at these special sales, we often sell this merchandise for less than it actually cost, so that we have lost not only the expense of carrying the stuff there in the store—as incurred in 1919 and in 1920. By less than cost I mean less than the invoice price on the goods. The clothing buying is done the previous season, spring for fall and fall for spring. Goods bought in the spring for fall are delivered from August 15th on, and goods bought in the fall for spring are usually delivered from February 15th on.
132 Goods which have been bought the previous season when they come to the store, I fix the selling price on clothing; Mr. Daymon fixes the price of goods in the other departments that he has

charge of. Transfer lots in which an average cost price is marked are lots of goods which have cost substantially the same amount, something more or less, but no great variance in quality or in cost price. But there is an appreciable difference when the total number of articles put in the transfer lots and the cost reduced radically from a given line that is brought over, added together and averaged by the number of articles. Monroe clothes and Ford overcoats are intended and used for the man who wants the most he can get for the least money, a man of moderate means on most occasions. The percentage that is marked up on those clothes compared with percentages on higher priced clothes, silk shirts, high priced suits and high priced hats, is greatly less.

To the Court: The mark-up is a great deal less on cheaper priced goods.

Q. (Papers shown witness.) I show you Exhibits 114, 115 and 116 and ask you if those are invoices or bills from the Ford Clothing Company?

Objected to if not referred to in the indictment.
Sustained. Exception.

Mr. Hinman: I offer these three exhibits in evidence with their lot numbers appearing on each—same lot number—bills dated at different times covering a period from September 2nd, 1919 to November 20, 1919, showing the increase in the cost price to Weed's for this same kind and class and lot of goods between those dates; for the purpose also of showing the mark-up that Weed's gave to these particular goods at the time they came into the store and were allotted.

133 Objected to as immaterial.
Sustained. Exception.
Exhibits excluded.

Exhibit 78 for identification is one of the costs from lot number 36360, cost $30.50, marked price $60.00 as stated in the 22d item of the first Count in the indictment.

The Court: What do you want to prove about this?
Mr. Hinman: I want to prove by the witness, that this particular lot was bought by him in the spring of 1919 for fall delivery; that it was delivered at defendants' store and marked November 20, 1919; that it was an Alfred, Decker & Cohn lot of clothes; that he gave the marked selling price as it appears in the indictment. That at the time when he gave that marked selling price and it was placed on that suit of clothes in November, it would have cost—that suit was worth—market value——
The Court: That you will concede?
Mr. Cregg: Yes.
Mr. Hinman: There won't be any question about his competency?
The Court: No.

By Mr. Hinman:

Q. What was the market value—wholesale value—of that suit and the suits in that lot on November 29th, 1919, when you gave the marked selling price at $60.00; that is, what would it have cost you to replace that suit on that day?

Objected to. Sustained. Exception.

Q. And did you at the time you gave that selling price, or marked sales price for that suit of clothes, take into consideration—did that consideration enter into the fixing of that selling price, the replacement value, or the market value, of that suit on that day?

Objected to.

By the Court:

134 Do you consider what you would get in the market for it? The wholesale price fixed the price on it which you made to the customer?

By Mr. Hinman:

Q. That is, whether you took it into consideration?
A. Yes, sir.

Mr. Hinman: Let me repeat the question that the Court excluded.
The Court: No.

To Mr. Hinman: In giving that marked sales price of $60.00 on that suit I also took into consideration the elements that entered into the selling—merchandising—of those suits; I also took into consideration the element of the seasonableness of the goods and the possibility and probability of our inability to sell all of the lot in that season and to carry them over into a later season or seasons. I didn't have any intent or purpose at that time of violating, and I didn't believe that I was violating or have any suspicion that I was violating any provision of law in directing that this suit be marked for sale at $60.00. At that time when I gave those directions and marked-up price or the marked selling price, as fixed by me on that lot, I believed that was a just, fair and reasonable price to charge and ask for that suit under all the conditions as they existed at that time, and the merchandise conditions as they existed in Binghamton and in our store.

Q. And in doing that—in performing those acts—did you act in entire good faith?
A. Yes, sir.

The Court: That is for the jury to say.

Motion to have the last answer st-icken out. Granted.
Exception.

Mr. Hinman: Give me the 23rd item. In order to shorten it, and I think I can by putting one question for each count. I offer to show the same line of evidence which was excluded, but I want to show it by each item. I offer to show by the witness that the
135 market or replacement value of the men's suits covered by the 24th item of the first Count of the indictment on December 11, 1919, at the time when Mr. Smith caused the selling price to be marked of $75.00—to be placed on the lot, was $50.00.

Objected to as incompetent. Sustained. Exception.

Mr. Hinman: I also offer to prove that the wholesale market and replacement value of the lot of overcoats described in the 25th item of Count one of the indictment on August 6, 1919, the time when Mr. Smith caused the marked selling price of $50.00 to be placed on that lot was $40.00.

Objected to. Sustained. Exception.

Mr. Hinman: I offer to prove—no question is raised as to his competency?

Mr. Cregg: Why don't you simply say you make that same offer as to each count?

Mr. Hinman: It is different values.

The Court: You have made it as to one, I think that is sufficient, anyway.

Mr. Hinman: Let me make the same offer with reference to Counts two—and I do make the same offer—with reference to counts two, three, four, five, seven and eight of the indictment, where actual sales were made.

Same objection. Sustained. Exception.

Mr. Hinman: I offer to show that the replacement or wholesale market value of the suits or articles described in and covered by Counts two, three, four, five, seven and eight of the indictment on the dates when those respective articles were sold, as stated in those counts was greatly in excess of the cost price—actual cost of those articles respectively as stated in those counts.

Same objection. Sustained. Exception.

136 Q. In marking or placing upon each of the articles of the lots mentioned and described in subdivisions or items, 22, 24, 25 and 26 of Count One of the indictment and in Counts Two, Three, Four, Five, Seven and Eight of the indictment, did you take into consideration at the time as one of the elements in determining the selling price that you would have to mark on those goods—to some extent at least—the increase which had taken place in the market or replacement value of those articles since the dates when they had been purchased respectively, by you?

By the Court: What you thought was the increased market value——

By Mr. Hinman: What you know, so you can say?

A. Yes, sir. Based upon such knowledge as I had at that time of such increase, I did not on any one of those occasions or any occasion, with any one of those acts, intend to violate any provision of law. In the performance of those acts—having those goods marked at a price—taking into consideration all the elements which go to the making up of the selling price—the cost of selling, I fixed a selling price which I believed gave us or the concern a just and reasonable profit. The actual cost of Exhibit No. 95, the Nunn suit, was $21.25. That was bought in the fall of 1918 and delivered in the spring of 1919.

Thereupon the witness being cross examined by counsel for the plaintiff, testified:

I didn't know the Lever Law at that time. I am interested in the conduct of the affairs of this Nation and interested in the laws passed by Congress.

Q. Didn't you know that the Lever Act had been on the Statute books since 1917—or didn't you pay any attention as to what Acts were passed in Congress?

A. Not particularly, no, sir. Referring to this suit to
137 which I have just testified, the cost price stated on the invoice is $21.25. It was received in the store February 13, 1918. I placed it for sale at that time at $35.00. The suit was carried over until 1919. You can term it a left-over. It was carried over. It was not in a sense, what I stated in Court was a left-over. I stated that we had certain goods that were left over from 1918; it was left over again in the spring of 1919 and carried. Then it was put into a transfer lot. That suit was not marked at $12.10. I know it wasn't.

To the Court: It was first put on to sell at $35.00, and sold at the time of the sale at $40.00.

To Mr. Cregg: I couldn't say exactly when I did mark it $40.00. I did not mark it $40.00 after this law went into effect. It was not my system to get all I could for the articles in the store regardless of what we paid for them. I didn't testify that I marked the articles for what I felt they would sell for. I did not take that into consideration at all when I was marking them. My position is Secretary, Treasurer and Manager. Mr. Daymon testified here yesterday; he said that he owned one share of stock. I don't recall that he said first whether he didn't know whether he owned any or not. That one share of stock was given to him simply for the purpose of acting as a director. Mr. Daymon is a director. He is given one share of stock simply for the purpose of allowing him to act as director to come within the law. He did not pay a dollar for it. I have one share of stock. I didn't pay for it. If you put it that way, I am in the same position as Mr. Daymon except that I am fortunate enough to be a son-in-law of Mr. Weed. In 1919 my salary was $6,500.00. I am now getting $10,000. Part of this overhead that I figure for 1920 is this $3,500.00 increase to me. That is covered in the expenses. I didn't take that into consideration

138 at the time I was marking these garments for sale. I took into consideration the total expenses.

Q. You know, as a matter of fact, that your overhead for 1919 was only 1½ per cent taken from your books?

A. I know it is wrong. We have those books in existence. We could produce them here and let the jury see them if we wanted to. They could be produced. We try to sell everybody that comes into our store, that has the money to pay for our goods, whether he is high or low. There is a great expense in the alteration of men's garments; sleeves may be shortened in some cases—more than that. Trousers may be shortened, or the coat taken in—those are small parts of it. The garment is perfect when it comes there but it does not fit the men. This last garment that was produced here had not been delivered, it was waiting for the man to come in—there were no alterations made, not so far. There have been no alterations made on any article mentioned in this indictment. There cannot be any expense of alteration charged up to any of the articles mentioned in this indictment—not until they are sold. The ones in the first count have not been sold—the others have. Except the Nunn suit alterations have been made in every one of them. There were no alterations made on the Nunn suit. Mrs. Charles A. Weed, wife of the President owns the building. The rent for 1919 was $12,000.00 approximately. That was one of the items of expense. I am around the store daily and see what is going on in the departments. I am interested only in salary. My division of the profits of the corporation would be whatever interest is paid on my one share of stock other than my salary.

Q. And those are the only two things that you are interested in in the management of that concern?

A. No, sir, I am interested in the success of the concern principally, if you take it that way, that is, the profit it makes. I am

139 naturally interested to see the business successful, hope to see it grow, prosper, build up. It can only grow by the confidence of our customers. I couldn't say offhand how often we turn our business over in a year. By reference to the records I know about it: from memory, no. From memory I can't tell how many times merchandise was turned over in 1919, to be definite. Those figures I couldn't give you without referring to the records. I didn't get information from the records as to the turnover. That question didn't come up. I haven't considered it, I couldn't give you the figures. I know what you mean by turn-over of merchandise. Approximately, we will say we turn it over from two to three times in a year. The cost price of the 25th item in Count One was $22.05. We marked that for sale at $50.00. The mark-up on that is around 126 or 127 per cent. of the purchase price. The percentage of overhead in 1919 was between 27 and 32 per cent. 30 per cent. would be a fair average. 30 per cent on the selling price is around 45 per cent. on the cost price. I don't think it would exceed 45 per cent. 45 per cent on the cost price of $22.05 is $31.96. I stated a moment ago that from 27 to 32 per cent covered our entire overhead charges. That is a fact. I say 27 to 32 per cent on the selling price makes

approximately 45 per cent. of the purchase price. In order to get the net profit of that article you would add 45 per cent. of the cost price to the cost price, based on the present overhead. Those figures are correct. Actually the entire cost of that article to us in that store including our overhead is not $31.96. Those figures do not include any carrying charges for stuff used on that article. We don't figure our carrying charges year by year as we go along. That article—an overcoat—No. 31550, was bought I think in 1916. I heard Miss McCarthy testify yesterday. She didn't testify to my recollection that it was placed on sale on August 6, 1919.
140 If I remember correctly it was transferred to this present lot in 1919. We have an invoice that will show accurately the date that article was purchased, and can produce it here if you want it so you will have the exact date. Assuming it was purchased on August 6, 1919, and placed on sale that day, you would add no carrying charge. Assuming that it was purchased that day $31.96 represents the entire cost of that article including the overhead, including all salaries. Subtracting $31.96 from $50.00, the selling price leaves $18.04 net profit. If these figures I have here are correct that would make eighty-one per cent net profit. The next article, 26 in the indictment, overcoat purchased for $31.66 and sold for $75.00. The mark-up is $43.34 above the cost price. That is over 136 per cent. above the cost price. Add 45 per cent. of the cost price, gives the entire expense of handling that article, $14.24, making a total of $45.90. Subtracting those figures from $75.00, the marked for sale price, leaves $29.10. Dividing that by the original cost $31.66 gives about 91 per cent. net profit.

Q. 94 per cent, isn't it?

The Court: 93.

To Mr. Cregg: Assuming that we sold that article—the last item in Count One of the indictment—which was purchased for $31.66, for $75.00, we would make a net profit of 92 per cent plus on the cost price.

This is what I call a one-price store. The clerks were instructed to get the prices for those articles that were marked on them except when we had a sale. Any clerk in that department before he could let that coat go must receive $75.00 or the equivalent unless
141 otherwise instructed. They weren't otherwise instructed unless we had one of these special sales. The article in the Second Count is from my department. The cost price is $20.00; that was actually sold for $40.00 so that the mark-up was $20.00. 45 per cent of $20.00 is $9.00. Adding the $9.00 to the $20.00 gives the entire cost of the article according to the figures; that leaves a net profit of $11.00, which is 55 per cent of the purchase price. The net profit of handling that article is 55 per cent.

Mr. Hinman: I object to the question on the ground that it is immaterial, irrelevant and incompetent; the specific ground being that in marking that article at that time the witness was entitled to take into consideration the change of market, or replacement value—or that as an element in marking it—and that therefore, the

actual cost price is some period before and not material or relevant.
Overruled. Exception.

To Mr. Cregg: On that one article the store got 55 per cent net profit. The next Count, lot No. 20040, man's suit, is the article mentioned in this invoice. That is the suit mentioned in the 4th item in Exhibit marked 117 for identification, shown me. It cost the store $21.25 when it was purchased. It was actually sold for $40.00. The gross mark-up is $18.75, 45 per cent of the purchase price is the overhead and carrying charge as I figure it. The net profit is 42 per cent plus based on the cost price and not based on the retail price. The next Count in the indictment, cost price is $23.50. The article sold for $45.00. That is a suit in my department. The net profit on that article is 46 per cent. Count five is another article in my department, suit lot 22050. Average cost price $17.82. We actually sold that garment for $44.50. Subtract $17.82 from $44.50 it gives $26.72 mark-up. Add 45 per cent
142 to the cost price, I make it 105 per cent, based on the cost. In dollars and cents the profit is $18.67. The profit was more than the cost price of the article. Count 7 I believe is one of mine. The average cost price on that is $11.78. That garment was sold for $29.50. The gross profit is $17.72.

The Court: About another 105 per cent. Taking the actual cost of $12.50, the net profit would be little less than 100 per cent, 99 plus. The gross profit would be exactly $17. The last Count in the indictment is another item in my department. Cost price $32.25 and it sold for $60.00. The gross profit is $27.75. The net profit on that item is 41 per cent, but in dollars and cents approximately $13.24. I said I hadn't those figures, but approximately we turn our merchandise over two to three times a season.

Q. Well, approximately two or three times a season. So if you turned your merchandise two to three times a season at this percentage of 41 per cent it would make 82 per cent on that money invested—from 82 to 100, wouldn't it?

Objected to as speculative, incompetent, improper.
Overruled. Exception.

Q. That's right, isn't it?
A. According to the 2 per cent turnover.
Q. If you turn that two and one-half times a year—twice 40 is 80 and 20, would be what you make on your money that year?
A. Yes, sir.

Objected to as speculative.
Overruled. Exception.

On this article that we make 105 per cent net profit, assuming that we turned that two and a half times in a year, we would make 250 per cent on our money, that year on that particular thing. The people purchasing that article would be paying 250 per
143 cent net profit on that article.

Thereupon the witness being re-examined by counsel for the defendants, testified:

The overcoat item, No. 25 in the First Count, which has been marked as Exhibit 83—from the overcoat and the markings thereon and the invoice Exhibit 118, I can tell when and from whom that overcoat was purchased. It was purchased by Weed and Company in the Spring of 1916 and according to the invoice shipped by them August 31, 1916.

To the Court: It was offered for sale immediately upon its receipt, and we carried it to the season of 1919 for sale all the time. On that particular coat the only carrying charges in addition to this overhead, would be interest on that investment. I couldn't tell you how much in volume we carry over from year to year. I couldn't give you an estimate on it because we don't divide the stocks. The books wouldn't show that; that could be shown by an inventory only.

By Mr. Hinman:

Q. You stated in response to the Court's question that the only item of expense was the item of interest; did it also occupy storage room?

The Court: Paid for storage room anyway. The reason he kept it was because he couldn't sell it.

Mr. Cregg: The rent was paid for it anyway.

Exception.

To Mr. Hinman: There are special fancy styles that go out of date.

To the Court: That is all a matter of amortization.

By Mr. Hinman:

Q. This store that is occupied by Weed and Company—is it mortgaged?

144 Objected to as immaterial, as they rent it.
Sustained. Exception.

Thereupon the witness being recross-examined by counsel for the plaintiff, testified:

This coat is the item right here (indicating) on this invoice, the third from the bottom. I identify it by the identification mark in the pocket of the coat; the numbers 44340. We offered that coat for sale in 1920 at $50.00.

Thereupon THOMAS B. CRARY, called as a witness in behalf of defendants, examined by counsel, testified:

I reside in Binghamton; have lived there twenty-seven years. Am President of the 1900 Washer. I have known Gurdon H. Smith ten or twelve years and know his reputation in that community

where he lives. It is good. I am the Thomas B. Crary named in the indictment and the father of the person who bought the suit of clothes of the defendant Weeds Inc. in March, 1920.

Q. Are you familiar with the values of real estate in the City of Binghamton on Court Street?

Objected to as immaterial.
Sustained.

Mr. Hinman: They have raised a question as to the rent.
Mr. Cregg: We have raised no question; it is an item of rent. Who knows this building?
Mr. Hinman: I offer to show by the witness, to bring it right up.

Witness: I know this store. I wouldn't think that $12,000.00 was a fair and reasonable rent in 1919. I would think they ought to have more according to the rents they are getting on Court Street. That is a very low charge.

Mr. Hinman: I would like to inquire what is the Court's recollection whether or not it appears here in proof that that coat
145 which was sold to Nunn, and which in the indictment is charged as having cost $12.10, in fact cost $21.25.
The Court: Not only that but in figuring these costs up Mr. Smith took the figure of $21.00.
Mr. Cregg: I did, I took the figure Mr. Smith gave to me.

Defendant rests.
The Government rests.

Mr. Hinman: If Your Honor please, on behalf of defendants, and each of them, I move to dismiss the first count in the indictment and for the acquittal of the defendants, on the ground that the charges contained therein have not been established by the Government. It appearing now and by the evidence that the defendant. Weeds, Incorporated, did not come into existence until January 1st, 1920; and that is the particular one I urge and direct to Your Honor's attention.
The Court: I shall rule, in so far as the conspiracy charge contained in the first count of the indictment is concerned, that, as to its application to the corporation the jury shall be confined in its consideration of the guilt or innocence of the corporation, to the acts and conduct of the officers of the corporation, and the selling by the corporation from the first of January down to the date mentioned in the indictment—April first.
Mr. Hinman: Let me note an exception to that, upon the ground that there is no proof here, and no claim made, that any of the articles mentioned in the first count of the indictment were sold after January first, 1920.
The Court: It is charged that a conspiracy was entered into. That, on the 11th day of March, two government officers visited the store; and they were told and shown these articles ex-
146 hibited for sale, and that those various articles exhibited for sale were sold in furtherance of the conspiracy; the allegation

is that each of them constitute an overt act in furtherance of a conspiracy.

Mr. Hinman: Note an exception, that the evidence in fact does not warrant the statement of the Court.

I also move, if the Court please, to dismiss—is the word dismiss or quash?

The Court: I would say to move to dismiss the indictment and for a verdict of acquittal.

Mr. Hinman: I move, then, Your Honor please, on behalf of the defendants, to dismiss the counts 2, 3, 4, 5, 7 and 8 of the indictment, and each of them, and to direct an acquittal on those counts, and each of them, on the ground that the facts stated therein have not been proven, and that the facts proven as to each of those counts do not constitute a crime or offence, within the meaning of the statute.

The Court: You move to dismiss the indictment on the ground that it does not sufficiently state, and that there is no evidence of record in the case that a crime has been committed as charged.

Mr. Hinman: Yes. I adopt the language of the Court.

Motion denied. Exception to defendants.

Mr. Hinman: Now I move to dismiss each count of the indictment and for an acquittal of the defendants upon each and all of the following grounds, namely:

The Court: Senator Hinman, you may make motions from now until evening, and you won't improve on that last motion.

Mr. Hinman: If I may read this which I prepared—upon the following grounds:

147 1. Existing conditions do not justify the employment of the continuance of war powers granted by the Constitution——

The Court: That is something which must be addressed to the Congress of the United States.

Mr. Hinman: I know that is so. I want to state the grounds.

2. Upon the ground that the Act upon which this indictment is based *in* an unconstitutional attempt to delegate legislative powers to other individuals, and boards and bodies.

3. That an allegation of what constitutes a reasonable selling price, or profit, if based on the statute alone, is unconstitutional because not fixed by any statute; and, if based on a claim that the price has been fixed by any agency of the government is unconstitutional, because no constitutional method has been prescribed in the act for fixing the price of any commodity.

4. The law on which the indictment is based, and each count of the indictment is based, is in violation of Paragraph 1 of Section 2 of Article 4 of the Constitution of the United States, in that it denies to citizens of one state the privileges and immunities granted to citizens of other states.

5. The statute——

The Court: What is your theory about that?
Mr. Hinman: There is one rule in one state and one in another.
The Court: It is a federal law and applies to all states in the Union.
Mr. Hinman: I think that is a question—I don't think it is sound, but I want to raise it.
The Court: What is the use of referring to it.
Mr. Hinman: It may be stricken out.
The Court: Go on.
Mr. Hinman (continuing:)

148 5. That the statute is void, because it is in violation of the provisions of Paragraph 1 of Section 2 of Article 4 of the Constitution of the United States, in that, as administered, it denies the equal protection of the laws and the statutes uniformly throughout the several states. It is in the same form.

The Court: What is the argument on that?
Mr. Hinman: Same as in the fourth, which I have stated.
The Court: What is the reason for that?
Mr. Hinman: Because it is so indefinite and uncertain.
The Court: You have given the wrong section.
Mr. Hinman: It raises the same question only in a different form.
The Court: You have the wrong section; better have it correct.
Mr. Hinman: I will look at it in a moment and correct the error.

6. The statute is in violation of Article 4—the statute is void and in violation of Article 5 of amendments to the Constitution of the United States, in that it deprives persons of their property without due process of law and takes their property for public use without any just compensation therefor.

7. The statute deprives persons of property and takes property without just compensation; the value of such property is not considered, and only the cost thereof is taken as a measure of value; and, therefore, the statute violates Article 5 of the amendments to the Constitution of the United States.

The Court: The statute doesn't say that.
Mr. Hinman (continuing):

8. On the further ground that the statute is void and in violation of Article 5 of the amendments to the Constitution on the further ground that the statute and the indictment and the various counts in the indictment, are so drawn that they are vague, indefinite,
149 uncertain, and charge no crime or criminal offence.

9. On the further ground that the acts shown in this case to have been performed or committed by the defendants do not constitute an offence or crime under this statute on which this indictment is based.

The Court: You have covered that.
Mr. Hinman: I think so, in a little different form.

10. On the further ground that the statute on which the indictment is based and the indictment itself, violates the sixth amendment to the Constitution of the United States, in that neither informed the defendant of the nature and cause of the accusation.

Same thing only in different form.

11. On the further ground, that the articles mentioned in the indictment as to which proof has been given here, are not necessaries within the meaning and intent, or within the language, of the statute on which the indictment is based.

The Court: The last clause to that——

Mr. Hinman: I call Your Honor's attention——

The Court: The statute we are trying this case on says, wearing apparel.

Mr. Hinman: Here is the proposition: You said a moment ago the statute doesn't state——

The Court: The statute now, when these men are placed on trial says, wearing apparel.

Mr. Hinman: That is true; but the amendment of 1919——

The Court: You said a moment ago it wasn't there.

Mr. Hinman: I said as originally drawn wearing apparel was not in the statute; when effective October 22nd, 1919, clothing and apparel was inserted—inserted wearing apparel in the fore part of that section.

150 The Court: Everybody knows that. Correct your statement; you say it wasn't in the statute.

Mr. Hinman: No, I didn't say it wasn't in the statute; I say that the statute itself now defines what are necessaries—the definition of necessaries.

The Court: The statute always defined necessaries, except that in October, 1919, other necessaries were added, including wearing apparel.

Mr. Hinman: Your Honor, let me repeat so I can make myself clear—the point is that the statute defined necessaries as food, fuel and feeds; now, then, when they amended that they did not repeat the words there of any definition of what necessaries are; the words clothing, apparel, are not——

The Court: That isn't correct.

Mr. Hinman: Let me raise the question on the record, if I may—The ground is, that the items mentioned in the indictment are not defined in this section on which this indictment is based as necessaries, and have not been shown in the trial of this case to be necessaries, or within the intent, meaning or purview of that section. That is the point I want to raise.

The Court: The answer to that is, that Congress has definitely and specifically said that necessaries shall not be illegally dealt in, and one of those is wearing apparel. There can be no question about that.

Mr. Hinman (continuing):

12. On the further ground that the retailing of the merchandise specified in the indictment here, and as to which evidence has been given upon the trial, and to which all the evidence relates—the merchandising of that at retail is not within the meaning, purview or intent of the section upon which the indictment itself is based.

Now, I make that motion as to each one of the counts.

151 Motion denied. Exception to defendants.

Mr. Hinman: I make that motion on behalf of each of the defendants.

The Court: On each motion, as to each defendant, motion denied as to each of them.

Exception to defendants.

Mr. Hinman then made his summation to the jury as follows:

May it please the Court, and Gentlemen of the Jury, there are two defendants on trial before you, Weeds, Incorporated, a corporation, and Gurdon H. Smith.

Under the law both defendants are entitled to be represented and have their counsel speak to you in summing up and presenting the evidence and their views on the evidence, in order that you may have their views in entering upon your deliberation. I speak for Weeds, Incorporated; Mr. Coburn, of Auburn, whom I have known for many years, will present the evidence on behalf of Mr. Smith.

In this indictment these two defendants are charged with having violated the so-called Lever Act. I want just to sketch that to you: The Lever Act says, that no unjust or unreasonable charges shall be made in dealing with articles therein mentioned, such as feed, fuel and food and then included clothing. So far as this case is concerned—while the Court and I differ—the Court will hold, and you must follow his instruction, that clothing—apparel—is included; so we will discuss it from that standpoint.

The Court: The statute says wearing apparel.

Mr. Hinman: That is the language of the statute—wearing apparel—quite right. It also says that no person shall conspire or enter into any conspiracy or agreement, or make unreasonable charges for those necessaries. There are eight counts in this indictment; the Court has stricken out the sixth; there are seven left.

The first count alleges and charges, and, I want to call your attention to it—charges—that, on or about the 1st day of November—and I read it right from the indictment itself—"That on or about the 1st day of November, 1919, at said city of Binghamton, the said defendants did conspire, combine, arrange and agree together to exact and to aid and abet in exacting excessive prices for certain necessaries, to wit, wearing apparel." And, "That thereafter and between the 1st day of November, 1919, and the 1st day of April, 1920, and in furtherance of said conspiracy and agreement and for the purpose of effecting the object of the same, the said defendants did place and cause to be placed upon sale in their said store in said city of Binghamton various necessaries, to wit, articles of clothing at prices

and figures greatly in advance of the actual cost price thereof." Then follows a list of these articles you have heard so much about and that we have been over so many times. Twenty-six items with their lot number, cost price and marked for sale price. I wish you to note that they say there in that indictment that the defendants did conspire on or about the 1st day of November, 1919; and the Weeds, Incorporated, did not exist until January, 1920, and, therefore, could not have entered into any agreement at that time.

They do not say that those articles were sold or offered for sale, but that the sales price was marked on them. You will remember the testimony as to some of those articles. There is no dispute about it; the clerks have testified that they never were placed on sale at the prices marked, but at alteration sales. I went through
152 them with Miss McCarthy, if you will remember, and there is no dispute about that, that those articles charged in that indictment—twenty-six items and lot number marked—all of them, except eight were marked—the marked price was fixed before November 1st, 1919—before October 22nd, 1919, when this law took effect. There was nothing in this law with reference to clothing until October 22nd, 1919; and, with reference to those items, the marked price was put on there—I think all of them by Daymon, excepting four items—as to clothing, before the law came into existence, as far as wearing apparel is concerned. The other charges in the indictment, being seven in number, relate to specific sales of clothing—different sales at different times to different men; two of those sales being to the same man—Dr. Nunn—if you will remember. He bought three suits, and two of those suits are referred to in the indictment—counts 3 and 4.

This indictment charges and the law specifies that, before a conviction shall be had, the act must be done wilfully and intentionally; that it must be an intentional wrong-doing on the part of the parties charged with the crime; keep that in mind. These sales were made, you will remember, during January, February and March of this year. Those six sales of clothing that we are charged with having violated the law in making, two of those sales were made, one to Thomas B. Crary's son, president of the 1900 Washer Company, who was on the stand this morning; and Nelson, the real estate dealer—insurance man—was on the stand. No finer men in Binghamton than those who come here and testify to the good name, fame and credit of this store and Mr. Smith and their methods there; they have known this concern for years. This store was started back in 1863, perhaps, and been located right at that place since 1867—one price store. Those men have been here and testified to the good faith, good reputation and good name of Mr. Smith. Mr. Crary testified as to the suit, being the father of the boy named in the last count, you will remember. Dr. Nunn, a physician there, knowing what the value of clothing was at the time, bought this spring—goes in there and buys—not one suit, but three suits.

Now let us take this first count of the indictment and see what there is of this. These people were there in Binghamton; a man

over seventy years of age, reaching the end of life, with a
153 reputation that is as fine as any man you ever saw; I know him and have known him for thirty years. And he was there in his store one day in March of this year, conducting that old and well-established business; one of the most substantial concerns there and one of the most substantial men in that community; when in walk two government inspectors; and I find no fault with them, because they are employed by the government to do the things they are doing; they see a store front and at once conclude they shall go in and investigate that clothing store—and the only store they investigated in Binghamton—that they should go in and investigate that store. We make no complaint. They went in and were referred to Mr. Weed, this old man. What did he say to them? Did he go and consult a lawyer to see whether he had violated the law, or see if he could prevent their going through his papers and documents? and he could have prevented it, because a man's home and house is his castle; because your private affairs are your own. In that case, nevertheless, he did nothing of the kind; raised no question, and referred them to the clerks there, and said, "Show these people everything there is in the store"—didn't he?—everything. They went there on the first occasion—two of them—and spent, they say, two hours and half—one of them. Miss McCarthy says they were there from about two or half-past, when she got back from lunch, until half-past five. She tells you that the sales there average about a hundred a day; a hundred a day for a year is thirty thousand sales in that store, and a sales slip for every sale. Now, then, were they fair with this concern—were they fair? They went through that store, they looked at the books, they looked at the sales slips, they looked at the tags, they made inquiries and everything answered frankly and fully and fairly. They went back the second time and
then the third time Mr. Broderick went back and checked
154 up those sales slips for fifteen days—one thousand five hundred—and he examined them. And he has gone there and examined sales over that time; sales in that store of seven suits and these marked prices; and the proof is uncontradicted that those marked prices in count 1 were not for sale at that time. That is the evidence of Miss McCarthy and Miss Brown. You saw them here, and Mr. Daymon. The inspectors say they don't recall those placards there, but they were told that the stuff was being sold at half price sale. The marked price represented the then market value of that stuff. It was marked up by Mr. Daymon, and he testifies, and Mr. Gurdon H. Smith this morning testified, that when he marked those goods, the overcoats and clothing—Mr. Smith showed—and when Daymon marked the others—that they took the charge of the replacement of all of that stuff. Why didn't they do it? Suppose you bought a cow last year and paid fifty dollars for her, and the cost of cows goes up;—I can remember when—a long time ago—father used to pay twenty, twenty-five and thirty dollars was a big price for a cow; and my brother paid one hundred and fifty dollars the other day and she was not a thoroughbred, just

an average cow. If the law says you shall not sell it at an unreasonable price, and that cow, the day the law goes into effect is worth a hundred dollars and you make that price on the cow, aren't you justified as a citizen of this country, where you are guaranteed in your rights, to own, hold, have, possess and sell what is yours——

The Court: That argument is against the ruling of the Court.

Mr. Hinman: Your Honor permitted Mr. Smith to testify that when the market changes——

The Court: The Court says that is not an item they should consider; it might on the question of his intent.

155 Mr. Hinman: That is the point on which I am speaking. The question involved as to whether these indictments charge, and the law provides, it must be done wilfully and intentionally. Mr. Smith testified this morning that, in fixing these marked prices, in fixing the sales prices of the goods, he took into consideration the increase in value of clothing that had taken place in these years, just as things have been going on; and that he acted believing that he was not violating any law; and the action of these people here in opening their doors and files, their books and papers, shows that is the fact. Nothing to cover up—nothing to cover up. Now, then these inspectors come here—and I make no complaint of that—but they do not charge Weeds, Incorporated—this corporation—with having made excessive profits on their whole business. The testimony here is just this on that, and I will spend only a few minutes, because Mr. Coburn is entitled to part of this time, and I want him to have it—the total sales in that store in 1919 was $330,000; that was given this morning by Mr. Smith. Mr. Dolan testified that he was told there and saw the figures so he could verify it, that the gross profits in 1919 were $105,000. Mr. Smith testified this morning—and I think it was Dolan testified that the total expense of conducting that business in 1919—the total charge of selling the goods was $90,000. Ninety thousand from one hundred and five thousand leaves $15,000.

Mr. Smith's testimony is here that the total sales in that store in 1919 were $330,000, approximately. Three hundred and thirty thousand and net profit of fifteen thousand, taking the expense of ninety thousand from the total gross profits of one hundred and five thousand, leaves fifteen thousand profit on the turnover.

156 Mr. Dolan testified that he was told by the bookkeeper, and the books were there so he could see, that he was told there that the total cash invested—Capital stock—$148,000—total cash invested in the business, the items he figured up, $204,000. In other words, on the capital actually invested in the business for 1919, over $200,000, that concern made $15,000 net profit.

The Court: Where is the evidence as to that—where is the evidence of two hundred thousand invested?

Mr. Hinman: Mr. Dolan testified that the bookkeeper gave him those figures.

Mr. Cregg: Capital invested?

Mr. Hinman: Yes, sir, capital invested in 1919.

The Court: Why didn't you produce the books to show it?

Mr. Hinman: The books were produced there for him, and the testimony is that he saw them,—And, may I except to the inference that we should have produced the books in court.

157 The Court: May I ask counsel to confine himself to the evidence?

Mr. Hinman: May I note an exception that I am not confining myself to the evidence.

The Court: I think you are not.

Mr. Hinman: Note an exception. May I call your attention to the fact that Mr. Dolan testified that he had seen the figures?

The Court: Have you looked at the stenographer's minutes?

Mr. Hinman: I have not; I have it in my notes.

Mr. Coburn: It was practically conceded at the opening of the case as to the amount of capital invested.

The Court: I have no such recollection.

Mr. Hinman: Your Honor, I can't sum up this case under these conditions. Gentlemen of the Jury: I thank you, and I will retire.

Mr. Coburn: This is regarded as of great importance to us here—the gross profits and the interest on the amount invested in this business.

The Court: As to the question of proving this or not proving it, you had your opportunity.

Mr. Coburn: I assumed that, with the figures here, it was a matter of argument.

Mr. Hinman: There is no use spending time on it.

The Court: Counselor, I ask an explanation of that statement. Just step to the bar.

(Mr. Hinman comes to the witness box.)

The Court: What is the object of that statement?

Mr. Hinman: The object of the statement I just made?

The Court: I don't wish you to sit in that chair.

Mr. Hinman: I beg your pardon.

The Court: What is the object of that statement?

Mr. Hinman: That statement is, and this is the object
158 of it, that we haven't the stenographer here that took the case.

The Court: No, the statement you made.

Mr. Hinman: What statement do you refer to?

The Court: Go on with the case.

Mr. Coburn then made his summation to the jury as follows:

159 "May it please the Court and Gentlemen of the jury: I am very glad to be able at this time to meet a jury from Cayuga county. Some of you I have met before in the trial of lawsuits; some of you have been jurors in cases that I have tried. Some of you have grown up in the locality where I live, and I have known your people and I have known you for years. I know that you, with your knowledge of me, must have some confidence in

me and some confidence in the statements that I make to you in regard to this case, and I have confidence in you. I ask at your hands here a consideration of the evidence in this case; I want you to take it and consider it as jurors. I want you to consider it in view of the oath that you have taken here as jurors. I don't want you to take this case with the idea that you are to judge from the attitude, or what you take to be the attitude, of His Honor here, that he believes so and so; that isn't for you. You are to take and be controlled by the evidence as His Honor will charge you. If you get the idea that His Honor from his attitude favors the side of the defendant, it isn't your duty or your right to take that into consideration, because, he doesn't wish you to understand that he takes any side in this case, and I know he doesn't take any side in this case. That lie is going to leave to you to decide upon the evidence and upon your judgment and the proof in this case, as to whether or not this defendant, or either of these defendants, is guilty of the offence which is charged in this indictment."

"Now, when you take your oath here as jurors, you take your oath individually to take this evidence and decide the case according to that evidence and according to your judgment of that evidence. Do not go into your jury room and depend upon the judgment of your neighbor; you are here for your own good judgment. I don't mean by that that you are not to listen to a fair argument on the part of your neighbor as to where the right and wrong in this case is; and if he can convince you by logical, clear argument that he is right, it is not only your right but it is your duty to listen to it. But, if you go into that jury room believing from the evidence that these defendants are not guilty as charged in the indictment, it is your duty to bring that in as your verdict, and I know you will in this case."

"Now, the defendant, Smith, for whom I appear in this action, has come before you as a witness here; you have heard about him; you have heard who he is; you have formed some opinion as to what he is; you have formed that opinion not only from what you have seen of him on the stand, but you have formed that opinion from the evidence of those men—the like of whom I think I never have seen in a lawsuit for character witnesses. We have produced here the Lieutenant Governor of the State of New York, who has testified in regard to Mr. Smith's reputation. We have produced three or four men who have been mayors of the City of Binghamton, and we have produced the present mayor of the city of Binghamton. Now, gentlemen; that doesn't prove to you that Mr. Smith isn't guilty; but it establishes the fact that his standing in the community where he lives is such that you have a right to say, that, a man of his standing wouldn't intentionally and wilfully commit any illegal or unlawful act; and it is entitled, I say to you, to great consideration. At the very outset of this case it is a proposition and a well defined proposition for your consideration to say, is Mr. Smith, in view of the testimony of these character witnesses who have been produced here, in view of his appearance as he goes upon the stand, is he a man who would wilfully mark his goods up in that store to a

point where he was taking advantage—wilfully and intentionally taking advantage—of the people with whom he was dealing. Now, did he do that—did he do that? You heard the question asked of him by Mr. Cregg this morning, and you saw Mr. Cregg stand over him, and, in a voice you could hear for a mile, you heard him yell at him here; and I said to myself then, I don't believe a jury from Cayuga county are going to be influenced in their verdict by the tone of voice, and the loudness of the tone of voice, of the man who is examining the witness. You heard the examination of Mr. Smith in here; it wasn't necessary for him to shout at him in that way, and you heard his answer. He asked him, what did you intend by moving the figures up to that figure—did you have anything in view aside from the profit that you were going to make in that business? Yes; and he tried to force him to answer no; but, he said yes, he did have; he had the good will of that business that it had taken fifty years to build up; that is what he had in view. And, that is what they have always had in view; and it is the greatest asset that any man can have in any business. Two of the men who come here to testify to the good character of this defendant, Smith, are men, one of whom was a party to a transaction there which is the foundation for this indictment. One of these men—Dr. Nunn—bought three suits of clothes there. Now, I think it is a fair proposition that a doctor in a community like the city of Binghamton can be reasonably accused of having some intelligence; if he didn't have he wouldn't be a doctor. Now, when you take any man of intelligence who will buy three suits of clothes at one time, and buy them at a price so exhorbitant that he is imposed upon, it won't be the doctor—it won't be the doctor. Why, I have never felt that I could really buy—could afford to buy—three suits of clothes in all my experience at one time. If I bought three suits of clothes, I be-
162 lieve I should be reasonably certain I was getting them at a pretty fair price or I wouldn't buy them."

"Now, who is complaining here, is it the people of Binghamton who come here to complain of Mr. Smith and his establishment? No. The people of Binghamton, to a man, are proud of this business that has taken fifty years to build up there. But, who does institute this proceeding? These two inspectors come into the city of Binghamton—and I can see them now, walking down the street with a good black cigar pushed into their face—and, as they look along there, they come to this store; and they say, here is a good place for us to camp out—here is a good place for us to camp out; and they go in there and what do they find? Just as my friend, Hinman, has told you; they meet this old gentleman, who greets them as he would a friend, and takes them in and shows them the books; he turns them over to his clerks; his clerks hand out a thousand, or something like, sales slips, and they go over them; and they own the store—they own the store. And they take out of that whole bunch of sales slips, what? They take out seven; all articles of one lot—all overcoatss. They pick out those cases from the thousand, and they come in here; and now they want you to find this place, and this gentlemen, Mr. Smith, guilty of a criminal offence, because they were able to show

profit here to the extent of anywhere from nine to eleven to twelve dollars on a forty or fifty dollar sale. I asked this morning, when the district attorney was up here getting these figures of forty or fifty per cent, I wanted the figures in dollars and cents and I got them. I haven't time to turn to them, but I can call your attention to them so you will remember it, that, on a forty dollar suit, there was about nine, ten—possibly eleven—dollars of profit. If you go out on the street here and find a man selling lead pencils and you pay
163 five cents for a lead pencil when he bought it for a cent, he is making four cents profit on it; but, if you go around the corner to a store, where they are paying fifteen or twenty thousand dollars a year rent, and you buy something there, it means more than it does to the man here who is selling lead pencils."

"Mr. Smith and this defendant corporation were paying something like $12,000 a year for rent for this building, and that was only one item. Of course, my friend will say here, we have figured this thing out and that was a net profit—a net profit over and above all expenses. Now, I say to you, gentlemen, that isn't true; because we had the figures here; it is in evidence in this case and you can take those figures; if I am wrong I want to be corrected by His Honor; but I don't know where I would get these figures if it were not for the proof in this case; and if those figures are there, it shows that there was just $15,000 and something net profit. Not very much of a profit on an investment of over $200,000; and I claim to you that that is the best evidence in the world that they weren't relining and profiting that business over seven or eight per cent on their investment, in a business that they had no assurance wouldn't go to the wall inside of eighteen months. Now, you wouldn't want to invest your money for anything less than five, six or seven per cent, if you had an investment where you knew that there was no uncertainty as to the results of it. If you sell a piece of real estate in the city where you live, you expect to get seven or eight per cent income on it; and you insure it, and you know when you get up in the morning it is going to be there. Are you going to invest your money in a business that depends upon the times, depends upon circumstances over which you have no control and expect to get less profit out of it than that amount? So, I say to you, gentelmen, that, when they pick out these few
164 articles like these overcoats and establish to you the fact that they were making ten or eleven dollars on a sale, there were other articles and hundreds of them in that store that they could have picked out, where it would have shown either a small percentage of profit, or there wouldn't have been any profit at all. Now, isn't it reasonable? It is reasonable; and His Honor will charge you, that, in considering this case, you will have to take into consideration the average of these sales. You can't take any particular item here, any particular article, which may, for some certain reason, have been marked up at a large profit, and convict a man on that; but, you must take the articles as a whole; take those that are ma*r*ked down and average them up; and when you get all through, isn't the best guide on that proposition as to whether you have been profiteering or not, how you come out in the end when you balance up your articles and

show what a profit you have made on your enterprise? Take that home to you men in the country; you have some articles you sell on your farm at a moderate profit; you have others you have to sell at a greater profit in order to even up and come out even at the end of the year. If this law affected the farmer, where would the farmer be? You might make on your butter and you might lose on your eggs, or, you might make on your eggs and lose on your butter; but, when it came to the end of the year, you would want to average it up and see how you would come out taking it all together."

"Now, my friend is going to say to you, in his loud tone of voice—and, now, I say to you, you come from Cayuga county, and don't be influenced by a loud tone of voice, in your reasoning you don't want the volume of his voice; take his argument and ask yourselves, when you go into your jury room, has he put forth an argument here that will warrant me in saying that this man, Smith, who has lived
165 in the community of Binghamton all these years, is a criminal—is a criminal?—Why, my friend is going to say to you, this isn't really a criminal action—it isn't really a criminal action. Gentlemen, this is a crime, and this is a criminal action; and if you by your verdict say today that Gurdon H. Smith is guilty under this indictment as it is charged here, you say that he is a criminal just as much as though he committed any other offence. I say this to you, because I want, to impress upon your mind that it is a serious case. It is a matter that may not affect you today for the time, but it is a matter that will affect him and his family for all time to come. There is a little woman to-day in Binghamton waiting to get the news from this trial. I don't want to appeal to your sympathy; but it appears here that Mr. Smith is a married man; and it is a question whether you will take this case and decide it here offhand and send this man back to his home, to his friends, in the city of Binghamton, a criminal; and that is what you are going to do, if you convict him on this charge. He sat there this morning, and in his testimony he told you that he didn't know about this law;—he didn't know about this law; and, I dare say, that you can go to fifty merchants in the city of Syracuse to-day, and they will tell you the same thing. He was looking after the business and the interests of the business there. He didn't feel that he was a criminal, or doing anything criminal. Did he have any criminal intent, then, in marking these goods as he did mark them if he didn't even know what the law was? It is a question of intent here; and my friend will say—never mind Smith—find this defendant corporation guilty. If you find this defendant corporation guilty, you find Smith Guilty, because he is the corporation itself. If the corporation is guilty, it is because Mr. Smith has done something that he ought not to do; and, I leave it to you
166 to say if he has done anything more than you would have done if you had been connected with that institution. His Honor will say, if a man is guilty of a crime, look to his attitude at the time when the crime is pointed out to him. If he is a criminal and he is acting with a criminal intent, you can tell from his action; but the man that comes openly to you and says, if I have done anything wrong point it out to me, take my books, go through my store, you can't find a criminal intent with that man."

"I am afraid I am infringing upon my time, gentlemen; I would like to take two hours to talk to you; but His Honor has been very lenient and I will be as brief as possible."

"I want to impress upon you, as I have tried to do all through this argument, that I want you to take this case with every idea of its seriousness. Don't decide it as you would a lawsuit involving a few hundred dollars—there is more involved in it than that. It is a crime that you fasten on this man, if you say he is guilty in this case. If you find that intentionally and wilfully he violated this law, find him guilty. But, if you find—as I know you must, if you give this case careful consideration—that, if he did anything there that was within the letter and the spirit of the law, and did it unintentionally—unintentionally—and without a thought of committing any offence, then find him not guilty."

"Take this case, gentlemen, give it your careful consideration, and with your verdict we will be content."

167 Mr. Cregg then made his summation to the jury as follows.

"May it please the Court, and, Gentlemen of the Jury: Now, "comes the time for me, as representing the Government, to dis- "cuss with you the salient points in this case, upon which the Gov- "ernment says it relies for a conviction at your hands.

"I was interested—very much, indeed, gentlemen—as to what "part Mr. Coburn had in the trial of this case, or what part he was "going to take in the trial of this case. He did examine some wit- "nesses that were produced here and gave some character testimony; "but you couldn't help observing that Mr. Coburn knew absolutely "nothing about the conduct of the business in Binghamton—abso- "lutely nothing about the Weed store; and I was at a loss to see why "he was here. But, when I listened to his summing up this case, "and when I heard him say to you not to listen to me, because I "would talk loud—now, I am not to blame for the voice that God "gave me, and I hope I may carry it to the grave with me, or until "my lips are sealed in silence—he said to you, don't pay any atten- "tion to Cregg, but, because you are from Cayuga county and I em- "ployed by the defense in this case, am from Cayuga county, let "these criminals go. That is the sum and substance of his entire "argument before you, gentlemen, and nothing else. Did either "Coburn, or my friend, Senator Hinman, touch on the facts in this "case at all? Now, let us consider for a moment, gentlemen, what "his appeal to you really means. You are in here, as you sit in "that jury box sworn officers of this court; you are a part and parcel "of this court. You, as citizens of this great nation, sent here be- "cause of your intelligence, because of your standing in the com- "munity where you reside, and because of your ability, you have "been selected here as a part and parcel of this court now to see that "justice is administered. To see that the scales of justice are held "evenly; that they are balanced evenly; and that you, as sworn "officers of this court, in the honest and fair discharge of that duty, "will decide this case conscientiously upon the evidence produced

"here, and not because of any appeal of your own townsman before "you, asking you, because you have set in cases that he has tried, "because you may be friendly with him, because you would like "to see him win, if he was on the side of right. He goes further "than that, and says, you let me win, because I am from your county; "that is the sum and substance of his argument here, gentlemen; "asking you men to stultify yourselves and commit crime your- "selves in order to let these criminals go. That is the sum and "substance of his argument.

168 "Now, let us turn and see what the case is here and what "it is all about. Congress, being mindful of the conditions "that existed after the Civil War, and seeing what was taking place "throughout the country after this war, how the prices were rapidly "increasing, and how the reason for that was given—time and time "again—because of the war. Why are these prices so high? Be- "cause of war,—saw how necessary it was that some relief should be "given. That some law should be enacted to stop this terrible con- "dition that our country was in; to stop this soaring of prices; to "stop this making of wealth at the expense of the individual who "is not trained in the art of purchasing. So it happens, that, eleven "months after the Armistice was signed, Congress saw fit to pass this "Act. Now, some of you may say it is a political measure—it is an "Act passed by the Republican Congress. Well, if it was, a Dem- "ocratic President put his stamp of approval on it, so you cannot "say that it is a partisan measure or a political measure. It is a law "enacted by the people, for the people, and for the protection of the "people.

"Now, my friend says, that no one from the city of Binghamton "is complaining. It doesn't make any difference whether they com- "plain or whether they don't complain. Have they called the poor "individual here in the city of Binghamton who might have bought "that clothing had they marked it at reasonable price? Or, have "they called any but two witnesses from the city of Binghamton who "purchased articles there? Where is this great Doctor Nunn who "says he was satisfied? And, I say, in the face of their producing "some witnesses from the city of Binghamton and refusing to pro- "duce others, that Dr. Nunn saw when he was being fooled, that they "were profiteering on him, and refused absolutely to take the cloth- "ing at all, and that is why they haven't produced him here; when "he found that they were profiteering, he wouldn't take it.

"Some evidence has been offered here of the good character of "these gentlemen. You are entitled to take that into consideration. "But, however, in order to rob and fool the people, you must be "smooth, you must have standing in the community; and when they "find themselves in this highway, when they find themselves con- "fronting the bar of justice, I say, they needed all the help they "could get from former politicians and present politicians of the "city of Binghamton, that they produce here, to help them out.

"Now, let's see what this law is: 'That by reason of 'the existence "'of a state of war.' Now, it is what your Congress did, what the "President has said to you, and what the Court will charge you. If

"there is any man on this jury that doesn't believe in the enforcement "of this law, of course, he is unfit to be on the jury; and I know there "are no such men; but, it is your duty to take the law as it is. It is "your duty to enforce it as it is.—It is essential to the national se- "curity and defense, for the successful prosecution of the war and for "the support and maintenance of the Army and Navy, to assure an "adequate supply and equitable distribution"—and that word, gentle- "men, is significant in the trial of this case—'equitable distribution;' "now, what does that mean? That means that if these defendants "are able to purchase and do purchase an article for, say $7.82, that "they should place that on sale in their store at a reasonable
169 "profit above that figure. Why? That is why this word " 'equitable distribution' comes in;—so that the poor man "coming along seeing that article, would and could purchase it—that "it came within his means. Not that the rich man might come along "and they could put that up to fifty, sixty or seventy dollars, what- "ever they marked it, and make it exclusive, but so that the man "needing that suit of clothes to keep him properly covered, to keep "his body from exposure, might have the opportunity of buying it at "a fair and reasonable price. Now, that is the significance of that "word 'equitable distribution' as used in the statute.—'and to facili- " 'tate the movement of foods, feeds, wearing apparel, containers " 'primarily designed or intended for containing foods, feeds, or " 'fertilizers; fuel, including fuel oil and natural gas, and fertilizer " 'and fertilizer ingredients, tools, utensils, implements, machinery, " 'and equipment required for the actual production of foods, feeds, " 'and fuel, hereafter in this Act called necessaries.' Now, those are "the articles that are designated as necessaries.—'to prevent, locally " 'or generally, scarcity, monopolization, hoarding, injurious specu- " 'lation, manipulation, and private controls affecting such supply, " 'distribution, and movement; and to establish and maintain gov- " 'ernmental control of such necessaries during the war. For such " 'purposes the instrumentalities, means, methods, powers, authorities, " 'duties, obligations, and prohibitions hereinafter set forth are " 'created, established, conferred, and prescribed.'

"Now, could Congress do more, could Congress do anything else? "Congress couldn't actually come to these people and fine them or "make them stop charging those prices; so they created these mea- "sures and said that they should be used, and therefore, gave the "Department of Justice, in the performance of its duty, charge of "presenting this case against these defendants.

"Now, my friend says, this is the only clothing store in the city "of Binghamton indicted. That may be significant. I didn't intend "to refer to that, but he did. There were fourteen or fifteen other "investigations there, and I will leave it to you to say what that "means. Nobody sent them there; nobody was out to get something "from Weed and Company, nobody was after them; but when these "men saw the articles in the windows, marked as they were, and saw "the quality of the articles, they said, there is something wrong "here, I guess we better go in; and that is how they got in there;

"and the Senator, himself, brought that testimony out; and, gentle-
"men, they made no mistake when they did go in there.

"Now, the real charge in this indictment comes under this section:
"That it is hereby made unlawful for any person wilfully to make
"any unjust or unreasonable rate or charge in handling or dealing
"in or with any necessaries, or wearing apparel—having been defined
"in the preceding section as one of the necessaries. Now, that clause
"of the law covers the second, third, fourth, fifth, seventh and
"eighth counts of this indictment—the sixth count of the indictment
"being out.

170 "Now, as to the law in the first count of this indictment:
" 'That it is hereby made unlawful for any person wilfully
" 'to conspire, combine, agree or arrange with any other person'
"* * * 'to exact excessive prices for any necessaries, or to aid
" 'or abet the doing of any act made unlawful.' Now, what does
"that mean? Just let us consider that question for a moment. That
"means that if the defendant, Gurdon H. Smith, and any one else,
"had a common understanding or agreement that certain articles
"in that store were to be marked and placed on sale at an excessive
"price, they were guilty of violating this statute. Now, the statute,
"under the first count in this indictment is violated, even though an
"actual sale had never taken place, provided they marked and placed
"on sale certain articles. Section 101 of this Act, part of which I
"have already read to you, provides that the word 'person' wherever
"used in the Act shall include individuals, partnerships, associations
"and corporations. It is a corporation that is indicted in this action.
"When construing and enforcing the provisions of this Act, omis-
"sion or failure of any official, agent or other person acting for or
"employed by any partnership, association or corporation, within
"the scope of his employment or office, shall, in every case, be deemed
"the act, omission or failure of such partnership, association or cor-
"poration as well as that of the person himself. So that, under that
"law, a man might be in England; a man might be across seas, and
"yet his clerks, acting for him in his store, might exact excessive
"prices which would make him guilty of violating that law. Now,
"Congress deliberately put that provision in the Act so that a man
"couldn't come into court and plead ignorance and say that he didn't
"know what was going on in his store, when he was getting the
"profits, when the profits from these sales were going into his pocket.
"They say that you must be responsible for the men you put in
"charge of your business; and any act committed by them is your
"act or omission, and you must be responsible for it. I say that that
"provision of the law is a just one, for the reasons that I have given.

"Now, what happened? It is true that the defendant was not in-
"corporated until the 26th day of December, 1919, yet, His Honor
"will charge you—and as I regard the law—that, if a conspiracy had
"taken place between two of these defendants—by the way, Mr.
"Weed is named as one of the defendants in this indictment and he
"is not on trial because of the representations of his attorney that he
"is unwell and it would be unsafe and deleterious as to his health to
"place him upon trial. That is the sole reason why he is not upon

"trial here with those other defendants. Now, if those two men "agreed at any time before the 1st day of November to exact these "excessive prices, and then this defendant corporation was incorpo- "rated and it came into the conduct of all of the business, it then "became a part of that conspiracy from its inception and is just as "guilty as though it were in existence on the 1st day of November, "1919. So that those questions will not trouble you much after His "Honor gives you the law in this case.

171 "The real questions in this case for you to decide are the "facts set forth in this indictment. Now, the government "says, that, if it has established the facts set forth in the first count "of this indictment, it is your duty, upon your oaths as jurymen and "as your conscience will dictate, to find the defendants guilty.

"Now, appeals have been made to you by both counsel here to ex- "ercise mercy toward these defendants; saying that they have a wife "at home, or one of them has a wife, children, perhaps,—that evi- "dence was put in and stricken out, but yet you heard it—but you "also must consider that others, who had to buy articles at this store, "have children at home; perhaps some of them have to go naked be- "cause of the inability to pay these prices; and those are the things "that this law was enacted to prevent—some of the things.

"Now, let us see what we have in the first count of the indictment. "Take this case, gentlemen, if you please, and from the lips of the "defendant himself as he gave it to you upon the stand, and upon "his testimony alone, how, in the name of goodness can you get away "from finding the defendants guilty. The inspectors went down "into this store on the 11th day of March. They came in there and "they asked for the manager, Mr. Weed; and there is no dispute "about that, they went to the old gentleman themselves. They an- "nounced to him who they were, what they were there for;—we are "here to see whether or not you are violating the Lever Act, whether "or not you are exacting excessive profits. Now, considerable has "been made of the fact that he said, 'Why here are our books.' The "Senator knows very well that they had a right to inspect those "books and that they couldn't get away from it in the store there. "So, of course, he says we will allow you to inspect the books;—the "idea of examining a concern like Weed & Company of Bingham- "ton! So they go in there; they go through some of these articles. "The girl was there—the bookkeeper there—and they took that "memorandum, as they have said, from these sales slips—certain "articles—and bring them in here. Now, if, as counsel tried to in- "timate to you—and I want you to bear this in mind during all your "deliberations of this case—if that wasn't a fair sample of what took "place in the city of Binghamton, why, in the name of goodness, "haven't you presented your books here and opened them up before "this jury and let us see what you are doing in the city of Bingham- "ton. His Honor here offered to adjourn this court until tomorrow "morning, giving them an opportunity to present their books here "and open them up before you, and be fair and honest with you, that "you go through them, and let me ask some of these witnesses some "questions about these books and see what took place here.—So when

"the intimation, or insinuation, is made that the United States Gov-
"ernment hasn't been fair with these defendants, that these items
"charged in this indictment is not a fair sample of what took place
"there, I say to you, gentlemen, that is not fair with you. Now, if
"we weren't fair on that, why didn't they bring their own books in
"here and put them on the table and let you go through them page
"by page and see what was taking place there? So that I say on
"that point, gentlemen, you have nothing to consider, except
172 "the articles set forth in this indictment. But, they say to
"that, and I can't help but repeat that again, that we haven't
"been fair here; that we haven't produced a fair sample of the Weed
"& Company business, and this Gurdon H. Smith. I say that state-
"ment was made deliberately and for the purpose of diverting your
"attention from the real facts in this case; and, I repeat again, why
"didn't they produce their books and open them here before you so
"that you could see them and you be the judges of whether this was
"a fair sample of what they were doing or whether it wasn't.

"Now, the first count in this indictment, as I have said before,
"charges these defendants with having agreed and arranged together
"to exact excessive prices, in a store; and that in furtherance of that
"scheme, they purchased certain articles and placed them on sale in
"their store. The testimony is that many of these articles were pur-
"chased in August and September, 1919 and placed on sale in the
"store at the figures set forth here. The charge is, that, sometime
"between the 1st of November and first of April those articles were
"on sale at those prices. Are they fair in that respect? They
"come in here and say, you are all wrong in that; we never did the
"things you set forth there; they start out to prove that they never
"did it; and they come to the first item set forth in that count of
"this on the 21st of August, 1919. They say that $12.75 marked
"on that article was a marked on value, that they never intended to
"get it, that they meant to sell it—you remember that placard that
"is in evidence—they meant to sell it for $8.00 and some cents—
"a few cents above the price at which it was purchased, whatever it is.
"That is what they say they intended to do with that article."

Mr. Hinman: The placard doesn't relate to the first article; you are in error.

The Court: Second article.

Mr. Cregg: "Well, if it doesn't relate to the first article, we will
"take the second article—I don't care what it relates to; but it re-
"lates to some of these articles, anyhow, and Miss McCarthy, you will
"recall when she was on the stand, I tried and tried to get from
"her—isn't that the price the article was marked for sale at? No,
"it was the value—and it was the value. My friend complained be-
"cause I kept pecking at Miss McCarthy, but I did keep pecking at
"her, and she finally did say, yes, that was the sale price, and any-
"body coming in to buy that would have to pay that price for it.

"We go along until we get one of the witnesses who was on the
"stand to-day, or last night, I have forgotten his name. He says
"that is the system in that store; certainly, nobody has a right to
"even attempt to sell an article less than the cost price marked upon

"it—that is what he means; and the clerks do not even know what "the cost price of the article is; but they must get the marked for "sale price on it; and I believe this, that there are many clerks in "that store, if they know what those articles actually cost these de-
'fendants, would not be a party to it, to attempt to sell such
173 "articles to the public at the exorbitant prices set forth there. "You know that yourselves. Now, what is the method of this "secret mark here? Do you suppose for an instant, if they marked "their goods in plain figures in plain sight with the cost of the article "on it where the customer could see it, that any man would be in- "sane enough to give them 136 or 146 per cent profit on that article, "or 100 per cent profit? No, certainly not—they wouldn't; but, if "they can deceive the customer, if they can put a secret cost mark on "there, or no cost mark at all, so that the clerk doesn't know what it "costs, and when a man comes in there to purchase such an article, "why, here, $12.75 for a little suit for a child. What is the reason "for this? Why the advance in prices, what we had to pay for it, "that is why, we have got to get this. But if they would come out "and tell that mother the honest truth, as they should in war times "at least, do you suppose that mother would pay the exorbitant profit "for those articles? No; if they told the truth they couldn't commit "crime. Something has been said about this, that I would say that "this is not a criminal statute. I don't know where Mr. Coburn got "that insane idea, that I didn't consider this a criminal statute. I "say that it is a criminal statute, and it is your duty, upon your "oaths, to stand here and enforce that criminal statute. So again, "Mr. Coburn was wrong when he had such an idea as that.

"Now, just let us consider those articles for a moment—it won't "take long. Let us take the first five articles—after their great "splurge here—their great holler—the first five articles they placed "in this special sale and not another single article on that list, except "the cap down here, marked 21 in the indictment, and what do "they do with the little cap that cost them thirty-seven and one-half "cents? They take that cap and on a sale they had it marked regu- "lar price one dollar; and then, they are going to give the customer a "great bargain, they are going to give him a half-price sale, lead- "ing the customer to believe that they are selling the article at 50 "per cent of what it cost them—what do they do with the little cap, "cost price 37½ cents? Why, they place it on sale at 69 cents. "Great bargain to the fellow that was getting it. Now, they may "have sold these other five articles at a less figure; but, I say, gentle- "men,—I don't know what His Honor will say about this, he may "take it out of the indictment and he may not, but I don't care "whether he does or not—and I say to you that they did mark those "articles; they placed them upon their shelves at those prices; they "tried to get those prices; and when they saw they couldn't, they "placed them on sale some time in February, between the 11th and "21st, and that is the only time that the sale existed.

"Now, take the next item. They tried to prove to you that $7.25 "was not the true cost of the first item set forth in that indictment. "They tried to prove to you by Miss McCarthy that that was what

"is known as a transfer lot; intimating that they had been kept
"over and cost a great deal more; and that then, finally, it was
"marked down and given a value of $7.25. Now, they pro-
174 "duce the man from whom that article was purchased; and
"as an evidence of their fairness did they ask him what that
"article cost? Didn't I have to bring that out from him? I was
"curious to know; I didn't care whether it cost more or whether it
"cost less; I hadn't seen his figures; but I wanted all the facts that
"I could get before you men here, whatever they were, whether more
"or less; and he testified, didn't he, that the original cost price of
"that article on the 21st of August, 1919, was exactly $7.25—did he?
"Then when we had beat them to it on that, when they found out
"that I was going to say they could produce every one of those
"invoices if they saw fit, and that they could give you the exact
"information of what every single article in that store was purchased
"for, then they had Mr. Smith come on the stand and say, why,
"there isn't much variance, they are all about of a price. I bet
"you, gentlemen, if the truth were known, if they had produced all
"of these invoices, they would show that many of them cost much
"less; and that instead of marking them up, they boosted them up,
"as they did the price of this one cost that was placed on sale
"originally at $35.00, and then, after this law took effect, they de-
"liberately sold that as five dollars more than they had it marked
"for sale at, after this law went into effect. Now, they attempt, gen-
"tlemen, to plead ignorance of this law. His Honor will charge you
"that ignorance of the law excuses no man, and, above all, men
"of the office and the club. An intelligent merchant, doing $330,-
"000 worth of business in a year; why, I am astonished that they
"should dare to come into a court and say, why, I don't know what
"my business is doing, I don't know what is going on at Washing-
"ton; all I know and all I care about is how many filthy shekels I can
"add to my already ill-gotten gains. That is the sum and substance
"of his answer. He said that the two things he took into considera-
"tion when he was marking up these garments was the cost price,
"the overhead expense; I asked him what he took into consideration
"in the overhead expense, and he said he took the actual overhead
"expense, which included 'my' salary and the salary of my father-
"in-law; and then I took into consideration what profit I could make
"above that on the share of stock that was given to me. Isn't that
"his testimony in this case? Then I said, did you take anything
"else into consideration, yes, I did. Mr. Coburn attempted to tell
"you that his anser to that was that he took into consideration the
"good will of Weed & Company. Did he make any such answer as
"that? If he did, I didn't hear it and I stood right by his side. His
"answer to that question, as I recall it, and if I am wrong you will
"correct me—his answer to that question was, 'Yes, I did take some-
"thing else into consideration.' I said 'What?' He said, 'The
"profit to the company'—to his father-in-law and Mrs. Smith. I
"suppose Mrs. Smith is his wife. She owns stock in this store.
"When this man was carrying home his $10,000, if the little wife
"was waiting in the vine-clad cottage on the hill for him to come in,

"as she is waiting now to hear whether or not justice will be handed "out at your hands, and whether or not, because of this man's posi-
"tion and because of his influence, that you, as honorable men,
"will stultify yourselves and convict the men who may hap-
"pen to come into court without position, without influence,
"and without numerous counsel from your own county and from the
"county of Broome. Why, the idea, men, of the things he asked
"you to do; and how he has asked you to stultify your conscience
"in this case is almost appalling to sit here and listen to.

"Now, what are the real facts? I started three or four times to
"get them, but you will pardon me for wandering away, let us see.
"The net profit on the first article, 30 per cent, after paying all of
"these overhead expenses, the $10,000 salary that was boosted last
"year from forty-six hundred or fifty hundred to $10,000 whatever
"it was, but I know there was a great boost. Now, why was that
"boost made? Was it because of Smith's ability, or was it because
"he was a son in law of the president of this great corporation?
"Those are the things that Congress sought to prevent. Those are
"the things that Congress said couldn't, shouldn't and wouldn't take
"place, as long as there were jury tribunals before whom these men
"could be brought and before whom they had to answer. Now, you
"have all the way on that list there—I am not going to take the
"time to go into each article—you have all the way from 30 per
"cent to 91 per cent net profit on those articles. Now, that is the
"real question; there is the crux of this action, gentlemen, right
"there. Now, is it fair, is it reasonable, is it Honest, is it honorable,
"for a man in these times, when Congress had to pass such an Act,
"to make 91 per cent net profit on the handling of one of those
"articles? 91 per cent net profit; is that fair, is that right, is that
"just? If you men are ready to put the stamp of approval on such
"prices as that, then I might as well stop talking. Did my friend,
"Mr. Coburn, or Senator Hinman, say one thing about the real issue
"in this case? Did they touch it at all, or get anywhere near it?
"No; they conceived the idea—and wisely, too—that the further
"they could keep away from that issue, the further they could get
"the jury away from that issue, the better their chances would be
"of an escape from their just deserts in this case.

"Now, just for a moment let us consider this: You take this over-
"coat, where, if they sold it for $75, they would have made 92 per
"cent net profit. They say that that isn't right; that the govern-
"ment hasn't been fair with you men on that proposition; the gov-
"ernment is attempting to mislead you on that proposition; there-
"fore, this is an unjust prosecution. Now, let us see about that. If
"they had sold that coat at the figure marked here they would have
"made 92 per cent net profit. Here is a suit, No. 22050, cost price
"$17.82, set forth in Count Five of this indictment. Now, this is a
"suit that was actually sold and a suit for which they actually got
"the cash and made the profit. Let us see whether the government
"has been fair or not. The other count in the indictment charges
"them with attempting to get 92 per cent profit. This count charges
"them, and we prove, that they made 105 per cent profit—actually

"got it. And that came from the lips of Mr. Smith himself when
"he was upon the stand here—didn't it? Now, has the gov-
176 "ernment been fair with these defendants? Did we attempt
"to show anything more than the evidence here proved and
"that we could prove and did prove, and knew we could do it before
"we started this case? How can they say to you that the govern-
"ment is attempting to persecute anybody?—Why, the fallacy of
"such an argument. If they had only stopped to figure, themselves,
"I can't see how they would have had the effrontery to ask you men
"to believe such a thing. Why, they must have thought that I
"was insane or asleep, or that you men were insane or asleep, or
"that they could fool you. Or, Mr. Coburn must have thought
"that there was some friend on this jury to whom he could appeal,
"and that wouldn't convict these men because Mr. Coburn asked
"him not to. Now, one or the other is the reason; and I know
"there is no such man on this jury; that all the Coburns from coast
"to coast couldn't influence a man on this jury or lead him astray
"from doing his duty as he saw it. Now, has the government been
"fair on that? "There is an article actually sold at 105 per cent
"net profit; and sold when? Sold when? On the 21st day of
"January, 1920, right in the face of this very law. Now, some at-
"torney must have incorporated this defendant, and, certainly, the
"attorney that incorporated them, I say, advised them that there
"was such a thing as the Lever Act. I know that no reputable
"attorney anywhere would incorporate a company without telling
"them that there was such a thing as the Lever Act; and that was
"done on the 26th of December, 1919. Now, what takes place after
"that? On the 21st day of January they actually make 105 per
"cent net profit; what does that mean? That means a profit after
"paying all the overhead and carrying expenses of every name and
"nature. Mr. Smith said that his overhead charges were from 27
"to 32 per cent; but, according to his own figures here, if you will
"stop to figure it out a moment, the actual overhead expenses as
"based upon his own figures given his counsel here, was only
"27 5/10; and when he attempted to get higher than that he had
"to switch it. He wouldn't go on record. And, again, I say, they
"could have produced their books to you here and showed you the
"actual figures of their overhead expenses right to a fraction of a
"cent. I showed right in the face of the jury, when he would add
"4 per cent to the 27 5/10 that these figures here are only approxi-
"mate, and that they were given in the most favorable light to him-
"self; he didn't want to go on record as to that absolutely, but he
"says, approximately. He says his gross business for 1919 was
"$330,000.00; his overhead expenses, $90,000.00; therefore the per-
"centage of overhead that based on sales—figure it for yourselves
"when you get into your jury room—is 27 5/10, the best he could
"make it; isn't that so? So that figuring it whichever way you
"want to—and when he estimated the overhead on the cost price,
"you can rest assured that he took figures most advantageous to
"himself, and I told him to do it so there would be no question
"about it but what we were fair with him. Then, after taking out

"all of that overhead, which included the $10,000.00 salary going "to himself—many thousand dollars more than His Honor himself, "sitting upon the bench is getting, and almost five times as much as "I am getting to help this government here—drawing $10,-000.00——

177 The Court: We work for the government, and that is our business.

Mr. Cregg (continuing):

"Now, after taking out all that salary, and after taking out $10,-"000 for his father in law, and I don't know how much more for "other things, he has a total of 105 per cent left. Now, let us con-"sider that carefully for a few moments so as to see exactly what "that means. This coat may be wool, or it may be cotton; but I "bet it is cotton; they didn't offer any evidence on that. But if it "is, it started with the cotton planters in the south. Or, if wool, it "started with some farmer having to purchase a farm and buy sheep "and place them upon that farm, to get the few threads of wool that "is in that coat. The poor farmer had to live; the poor farmer had "to take the chance of whether or not his sheep would live, or what "cash some jobber would pay him for that wool when he sheared "the sheep. Then, the jobber must take that wool, make a profit "from it, or must take the cotton and make a profit on it. Then "it comes into the cotton gin, or into the mill and is spun into thread; "and from then on every man that handles it must make a profit "on it if he wants to live or expects to live, so these dealers may have "more articles upon which they can make this 105 per cent profit. "It must finally go to the cloth manufacturer and be woven into "cloth. Every man must make a reasonable profit on that article "as it goes along up; he is entitled to it; a man is entitled to his "hire. Then it goes along to the clothing manufacturer—goes from "the mill to the clothing manufacturer; it goes through the hands "of a jobber, each man making a profit on it as it goes along. "Finally it goes into the clothing manufacturer's hands; then he must "supply other necessaries or findings, and whatever he is obliged "to furnish there in the manufacture of the clothing he must make "a profit on. He must pay his help, he must stand his overhead, he "must take his chances on selling, all the way along, until it comes to "the finished product, when it is placed upon the shelves of these de-"fendants, after having passed through the hands of from five to "seven different people, all of whom are making a profit. Now, what "happens after that is all done? And, it is very significant, gentle-"men, and something which you must take into consideration when "you go into your jury room, what happens after that is all done? "After this article is all finished, placed upon sale in the store, these "men are not willing to take from the public a fair and reasonable "profit, but, they say, we have the opportunity, it has now got to "the point where we can fleece the public, it has got to the point where "there are no experienced buyers coming into our store, this is our "opportunity to get rich; this is our opportunity to add to our al-"ready ill-gotten wealth; and what do they do? Why, gentlemen "of the jury, think of it for a moment; are they satisfied with a

"fair and reasonable profit on that article? No, they are not. But,
"because of their wealth and influence and standing or their position
"in the community, they think that they can come before a jury
"and get away with it. They say, we will make 146 per cent
178 "profit on that article, more than all these others put together,
"more than the source of the article itself, more than all these
"others put together, which is about 40 or 50 per cent added to it.
"Why, they make more net profit on that article itself than all the
"others do from its source to their shelf—don't they? 105 per
"cent net profit; think of it! That is the real issue in this case;
"that is the issue which you are called upon to decide in this case,
"men, and which you can't get away from, and I know that you
"won't get away from it. Now, did my friend, Mr. Coburn, or Sen-
"ator Hinman, say one word about that issue before you here, or
"did they talk about a single item set forth in this indictment? I
"say that they didn't, gentlemen; and you recall that they didn't
"say one word about that. As I have said before, they didn't want
"to say anything about it, because they couldn't. There is no
"argument that they could advance; there is no feasible reason
"that they can give an individual on this jury as to why these men
"should be let go.

"Now, gentlemen, I don't want to go on through every single item
"in this indictment. You recall the testimony of Smith on these
"different items here and what he told you his net profit was. The
"question finally comes down to this—bearing these things that I
"have said to you in mind—the question for you to decide is this;
"are you men going to stand up manfully and upon your oaths as
"jurors, as your conscience would distate, and decide this case on the
"evidence here, and say to these men, you have exacted an unjust
"and unreasonable rate and charge and you must stand the conse-
"quences. In other words, you had the music and you must pay the
"fiddler—to put it that way. Now, these men come in here and
"plead to you for mercy and sympathy. Mercy and sympathy are
"beautiful attributes, gentlemen; but a higher and more noble at-
"tribute than all is common, old-fashioned justice; and that is
"what you men will hand out in this case; I know it, as I look into
"your eyes. Now, these men listened—these men listened to the
"call of the god of gold; that is the reason why we are here. Now,
"ordinarily, gentlemen, without such a law as this, these men had a
"right to make whatever profits an individual would pay them; they
"had a right to mark their goods and get what they could; but,
"seeing those conditions, Congress said, we must stop it—we will
"have to stop it. And did these men stop when Congress told them
"to? They said no, our excellent reputation will carry us through.
"They started years ago, gentlemen, singing the anthem of avarice
"and greed, and they have continued to sing it to the present time,
"in charging these exorbitant prices; and they ask us now to put the
"stamp of approval upon those contemptible acts, and say, to them,
"why, yes, charge all you want; charge 500 per cent; make 250 per
"cent net profit on your money in a year; take it out of the poor
"individual; take it out of the unsuspecting public, and come here

"and we will let you go. Will you put the stamp of approval upon "such practices as that? Why, think of the things they ask you to "do! I know you will not do that. I know that you will say to "these men, and to all other profiteers throughout the country, that,

"while this law is upon the statute book, it must be obeyed;

179 "and the man that violates that law for the purpose of adding

"a few more dollars to his already ill-gotten gain, must come "into court and must pay the penalty, whatever His Honor sees "fit to inflict; and with the penalty in this case, gentlemen, I say to "you that His Honor will charge you, you have nothing to do. The "simple and sole issue for you to decide in this case is whether or "not these men charged an unreasonable rate in handling and dealing "in and with those articles, or whether they did not; and when "you have done that, you have performed your full duty, and you "can look squarely in the eye any man whom you meet."

Mr. Hinman: Your Honor please, let me put on the record an exception to the summing up of Mr. Cregg, on the ground that it is inflammatory, unfair, and is an appeal to passion and prejudice rather than facts.

The Court then charged the jury as follows:

"Gentlemen of the Jury: The Grand Jury for this Northern District of New York has found an indictment against the firm of Weeds, Inc., a New York corporation, Mr. Charles A. Weed and Mr. Gurdon H. Smith. That indictment in eight counts, charged them with a crime, and to that indictment they entered a plea of not guilty. That plea brings for trial an issue for this jury.

Now, at the outset, an indictment is but an accusation of crime; that is, the Grand Jury accuses these two defendants and this corporation of crime. It is for a trial jury to say whether they are guilty or innocent of that crime. It is, therefore, our present duty in the interest of justice to-day to learn the truth as to the facts here and to pronounce each or all guilty or to pronounce them not guilty. The duty to determine that is for the jury; the jury is guided by what the Court says and adjudges as to the law; the facts are for your consideration solely.

When we were school boys—indeed, before that time—when we had the sweet admonition of our mother, the lasting phrase of our recollections was, that "Truth is eternal." When I see men who have left their daily occupation and entered the box as jurors, I just wonder if they realize that they are brought back to carry out that sweet admonition of their mothers in early days, to see that truth is eternal, truth is lasting, and to see that truth triumphs in the litigation with which they have to deal. That is your mission, that is your sworn duty to-day. This is the day, you know, in which we hear so much about Americanism. You and I understand Americanism to mean simply this: a willingness on the part of free men to accept the obligations of government, of the finest form of government known to free men, that is, a democracy. No man, or group of men, no set of politicians, or men of Christian or other beliefs, have

a right to a monopoly on that; that is a grandeur for free
180 men in America. And when men are called to jury service they assume that obligation and they accept it willingly—the obligation of a free man—a citizen— in determining issues which are presented to them between the litigants; in this case it happens to be the Government on one side, a corporation and one individual on the other.

Let us—you and I—approach this litigation with a full realization that we are blind to who is involved; we have no prejudices against any of the litigants; we do not know them; we are here in a court of justice wanting only what we think is the aim of justice. If you do that, you remember what your mother said, that truth is eternal. Clap your hand on the truth where it evidences itself to you in the testimony in the case; then you have gone a long way toward solving the controversy justly, correctly, and effectuating the law of the land. Therefore, you will recognize that you are the sole judges of the facts. I express no opinion—although I might—as to what the facts are. The rule is different in the Federal Court than in the State Court; but, in this case, I express no opinion; I leave the questions of fact for you to determine; I think it is a fit case in which it is becoming to leave it to the jury to say whether, under the rules of law that I shall call to your attention, the facts as found by you pronounce these defendants as guilty or pronounce them as innocent. You are not to be swayed unjustly or wrongfully by the pleas of counsel or the statements of counsel as to what the evidence is; you are the sole judges of the evidence; and where your recollection does not accord with the evidence as stated by counsel on either side, then, it is your recollection of the evidence that prevails and not that of counsel; and, under your oath, it is your obligation to accept your own recollection of the evidence.

Now, the Grand Jury, in the first count of this indictment, charges what is known in law as the crime of conspiracy. It says, that between the 1st day of November, 1919, and the 1st day of April, 1920, the defendants conspired as follows: "did conspire, combine, arrange and agree together to exact and to aid and abet in exacting excessive prices for certain necessaries, to wit, wearing apparel." And that to effect the object of that conspiracy, or in furtherance of that conspiracy and agreement, and for the purpose of effecting the object of the same, "the said defendants did place and cause to be placed upon sale in their said store in said city of Binghamton various necessaries"—and then sets forth a list of twenty-six necessaries that have been called wearing apparel, which you have heard testified to here, giving the cost price and marked for sale price. It says that, in doing that, the defendants were guilty of a criminal conspiracy, because they had agreed to do an unlawful thing; or, had agreed to do a lawful thing in an unlawful way or by unlawful means. That is just precisely what a conspiracy is. To conspire is to agree, to confederate, to combine. An illegal conspiracy is to agree, to conspire, to do a lawful thing in an unlawful way, or to agree to do an unlawful thing; and the conspiracy is complete, if,

181 having made the agreement, any one act is perpetrated or done by any of the parties to the conspiracy, provided that act is in furtherance of the object of the conspiracy. And so, where two men conspire to violate the law, or two men become a party to an illegal conspiracy, if while that conspiracy is in existence and not consummated, a third party, be that a corporation or an individual, joins that conspiracy and takes part in that conspiracy and agrees to that conspiracy, then, while the conspiracy lasts, that third party—individual or corporation—is equally guilty with those who started at the outset to conspire. Do I make that plain to you?

And, so, the Government's contention here is, that Weed and Smith conspired; and that, after the organization of Weeds, Incorporated, it joined the conspiracy, and they conspired to do what? They conspired, in effect, to exact or to charge an unreasonable and an unjust rate for what Congress has said are necessaries, that is, wearing apparel; and the Government says, that, having agreed to do that, they then placed certain articles, which have been called to your attention, in the store which they owned in Binghamton, and offered them, at these unjust and unreasonable prices, for sale.

Now, that brings to your consideration the Act of Congress that makes that unlawful, which has been commonly referred to as the Lever Act. After the world war came on, in time, America became a party to the war; and then emergencies arose, commonly referred to as war emergencies; and then the Armistice was signed on the 11th of November, 1918. Now, the President of your country and my country went over seas, negotiated peace and returned with it; that peace has not been confirmed by the Senate of the United States, and, for the want of the confirmation of the Peace Treaty, America to-day is at war with the Imperial Government of Germany. And, so, exercising its rights under the war powers given to it, Congress saw fit to enact what is referred to as the Lever Act, the amendment of which Act became effective on or about October the 22nd, 1919. This Act, so far as we have anything to do with it, provides, as follows:

'That by reason of the existence of a state of war, it is essential to the national security and defense, for the successful prosecution of the war and for the support and maintenance of the Army and Navy, to assure an adequate supply and equitable distribution, and to facilitate the movement of foods, feeds, wearing apparel, containers primarily designed or intended for containing foods, feeds, or fertilizers; fuel, including fuel oil and natural gas, and fertilizer and fertilizer ingredients, tools, utensils, implements, machinery, and equipment required for the actual production of foods, feeds, and fuel, hereafter in this Act called necessaries; to prevent, locally or generally scarcity, monopolization, hoarding, injurious speculation, manipulation, and private controls affecting such supply, distribution, and movement; and to establish and maintain governmental control of such necessaries during the war', and so forth. Then it provides, in Section 2, that it be made unlawful 'to make any unjust or unreasonable rate or charge in handling or dealing in or with any necessaries.'

182 Now, whether that law was a good law or a bad law is not for the judiciary or for us to decide; Congress had that to determine, and the Congress of the United States passed the law; it received Presidential approval, and is now on the statute books; and you and I come here in performing our duty in the judicial department of the Government and we enforce the law as we find it, you as jurors and myself as judge; and, as we find the law, we apply it to the facts which are particular and peculiar to the case which is presented to us.

We start off, therefore, with the law announcing that wearing apparel is a necessary; and the law condemns unlawfully making an unjust and unreasonable rate or charge for wearing apparel; and, therefore, our next and natural inquiry would be, what is an unreasonable and an unjust rate or charge? Now, an unreasonable rate might be said by a jury to be a charge or a rate without reason; an unjust rate or charge might be said to be a charge or a rate not justly put. How are you going to determine what is an unreasonable and unjust rate or charge? When this law became effective, in the theory of the law it became known to every citizen in the land; no man from that day on could step forward and say, 'I am excused because I was ignorant of the law,' for ignorance of the law affords no excuse under our law. Therefore, every man is presumed to know the law; and it is a natural inquiry for a jury to say whether or not a man blessed with education, or some intelligence, or who follows a particular occupation or business for years, does not keep abreast with laws which have to do with his particular art, trade or occupation.

Now, what elements may be considered by a jury in determining what is an unreasonable charge—an unjust rate or charge? Well, after all, the rule of reason has been with us, gentlemen, long; it is in our everyday life. In ordinary negligence cases we find a man at fault, or we say that his conduct has been careless or negligent, and we say his conduct is negligent or careless when he fails to do whatever reasonably prudent men would do under similar circumstances. And, in rate cases, the courts look upon the investment; what would be a fair return on the investment. How much money has the defendant invested in his business? How much rent does he pay? What are his overhead charges? What did he pay for the stock that he offers for sale; did he buy in the ordinary market, or did he buy in a depressed or an inflated market? Those are elements which certainly must be considered; and he is entitled to a fair and reasonable return and profit upon his investment in his business. All of those things must be considered as a guide for a jury in saying whether or not an unreasonable or an unjust charge has been made.

Let us for a moment consider what little evidence we have here. Most merchants keep books; this defendant kept books—they are not here; and we can only have the aid of such evidence as is produced here; and, taking that as it is, you may, of course, consider what it discloses as to these charges. It was disclosed this morning—Mr. Smith frankly states it—that, so far as the items over which
183 he had control, the item which he offered for sale as overcoats—in the first count of the indictment—indicated that if

the first overcoat, or overcoat of that lot, was sold at that certain price there would be a profit of 81% on that particular turnover; and on the second overcoat it would be a profit of 93%. Then on the sale made, for the article of clothing contained in the second count, 55%; the third count, 42%; the fourth, 46%; fifth, 105%; seventh count, 99%, and the eighth count, 41%. Now, there is in those eight articles, which I average—you may correct me by your figures, if you wish—something like 70%. Now, consider the overhead, the volume of business, the amount of money invested, the cost of the articles, the cost to do business, the salaries paid to the employees, to the officers; was 70% an excessive profit, and, therefore, did all that combine to make an unreasonable rate or charge? That is the question I leave for your determination.

We have this further piece of evidence: Mr. Smith says that the volume of business in 1919 was $330,000.00; that it cost about $90,000.00 to do the business, carry the overhead. That would show a cost of 27½% for the volume. Knowing those costs, and getting what we can from the costs as indicated by these accounts which were shown on the sales slips and on these memorandum cards that Miss McCarthy called to our attention, where the markup was approximately from 90 to 105%, did their profit which they added before they sold the merchandise in question so increase it as to make it an unreasonable and an unjust charge? If you take the cost price of about 50% and the selling price and the volume at $330,000.00 and add to the cost price 27½% for doing business, as those figures would indicate, you have something to aid you in determining how much profit they made on that $330,000.00 volume of business. These are only some of the things I think of, gentlemen, to call to your attention. We do not find here anything in exactness or accurate, unless you believe these figures to be accurate, as to exactly what their books show, or what, in fact, they did as a business or what profits they made; and, of course, the profits they made are only important in determining whether that caused them to charge an unreasonable and unjust rate or charge.

Now, the first indictment, as I have said to you, is for conspiracy; that is, a conspiracy to violate this Lever Act; but, the second count of the indictment charges a direct violation of that Act itself, in that for a suit which cost them $20.00 the defendants sold it to one Nelson for $40.00; and that, under all the existing facts and circumstances, it was an unreasonable and unjust rate or charge. The third count of the indictment charges the sale of a suit on the 9th of January, 1920, which cost them $12.10, to Dr. Nunn, of Binghamton, at a price of $40.00; the charge is that that was an unreasonable rate or charge. The fourth count of the indictment is that on the 9th day of January, 1920, a suit which cost the defendants $23.50 was sold for $45.00 to Dr. Nunn; and that that was an unreasonable rate or charge; and the fifth count of the indictment, in substance, is, that a suit which cost $17.82 was sold for $44.50; and that that was an unreasonable rate or charge; and that suit, also, was sold to
184 Mr. Nunn. The sixth count you need not consider for I have dismissed that. The seventh count charges, that, on the 29th

day of January, 1920, a suit which cost defendants $11.78 was sold for $29.50 to Mr. Pierson in Binghamton; and the eighth count charges, that, on the 3rd day of March, 1920, a suit which cost the company $32.25 was sold to Mr. Crary, of Binghamton, for $60.00. These are each of the specific articles of wearing apparel which are mentioned in the indictment, and for which the defendants received the money, thereby violating the Lever Act.

Now, gentlemen, the power of Congress to enact this law I charge you existed, and you are not to be affected by any claim of its unconstitutionality; for I charge you that it is constitutional, as a matter of law. At the time of its enactment, under the war powers of Congress, Congress had the inherent power to pass the law; and that to-day, when these two defendants are before the bar of justice, the law is effective; and, if they have committed an infraction of the law, they may be found guilty by a jury.

The defendants say this: that these rates or charges which they fixed on the several articles which are named in the indictment were not unreasonable or unjust rates or charges. They say, that, under the circumstances which are disclosed by this record, they have fully answered the claims of the Government; whether or not that is so is for your determination. We have no evidence here from any one who is engaged in this line of business who would tell us what would be a fair and reasonable margin of profit, or a profit to add to the cost plus the overhead and carrying charges—charges for doing business—which, as we know, would go to make up the price to the customer; and, since we are not informed on that subject, either by the Government or the defense; you must use your own good judgment. It is important in this day that law be upheld. If we do not uphold the laws there is no use in having them. We must consider the case in the attitude of the impartial man, finding out what the truth is. It is the little things that indicate the truth to you. They will be the guide for you in coming to a correct conclusion.

Now, the defendant, Smith, has taken the witness stand, becoming a witness in his own behalf; and he has offered some evidence of his good reputation, and that must be considered by the jury. Character is what a man is in point of fact; and reputation is what the people think of him. Reputation is always of importance in criminal cases, particularly where it can be said by a jury that the scales are tipping against him; because, where a reasonable doubt may not exist in the minds of the jury as to his guilt, evidence of good reputation may create a doubt, where, but for it, no such doubt would exist. But, if a man has violated the law, reputation of a good character won't save him, and can't and shouldn't save him. You have a right to consider very carefully all that has been said as to his reputation. Because a man enjoys a good reputation does not warrant him in
185 violating the law, and does not excuse him for a violation of the law. There are a few simple rules that I further call to your attention. When a defendant comes to the bar of justice he is presumed to be innocent; that presumption of innocence remains with him throughout the trial, and until it is removed by evidence of his guilt, which must be established to the satisfaction of the jury

beyond a reasonable doubt. A reasonable doubt is a doubt for which you can ascribe a reason; it is not a guess, a surmise, a conjecture, or an unwillingness to perform an unpleasant duty; it is a doubt which you can fairly and honestly say exists; a doubt for which you can give a reason. If there is a reasonable doubt in your mind, a doubt for which you can give a reason, I charge that you should give the benefit of that to the defendants. No man stands before the bar of justice advanced one step ahead of another, nor should any man stand before the bar in a position below another; one law and one court for us all, rich and poor alike; they stand equal before the law. That is the pride of American justice. They stand here, they ask for justice, no more, no less; no friendship, no aid; they stand here asking only justice, and that is all you can accord them, that is all you will accord them.

Take the case and examine the facts carefully. I have prepared for your foreman a sheet here indicating the counts; you may take that with the indictment and such exhibits as are in the case; and say whether the defendants are guilty or innocent. You must find, in order to find on the first count of the indictment, that either Mr. Smith and Mr. Weed conspired, or that Mr. Smith and the corporation conspired; or, you may find that the corporation and Mr. Weed conspired; or, you may find that none of them conspired. You may find one or both defendants on trial here guilty, on any or all the counts, as you think the evidence warrants.

Mr. Hinman: Your Honor please, permit us an exception to that portion of Your Honor's charge in which you stated, in substance, that the indictment, Count 1, states, that, between November 1st, 1919, and April 1st, 1920, the defendants entered into a conspiracy and agreement to exact excessive profits, and so forth.

The Court: I said the theory of the Government was that Weed and Smith entered into that agreement during that time.

Mr. Hinman: The language that Your Honor used, as I noted it——

The Court: So there may be no mistake about it, it appears that Weeds was not incorporated until January 1st, 1920; therefore, did not come into existence, and could only join the conspiracy
186 after it existed; or, the conspiracy may not have been formulated until after January 1st, 1920. In either case, if Weeds Incorporated was a party to the conspiracy, or joined the conspiracy, then it may be found guilty.

Mr. Hinman: Permit me an exception to that, because that isn't the charge in the indictment. The particular point to which I want to take exception is, that the charge in this respect was to the effect that the indictment, Count 1, states, that, between November 1, 1919, and April 1, 1920, the defendants entered into a conspiracy and agreed to exact excessive profits, and so forth; the point being that in the indictment it is charged, that, on or about November 1st they entered into it, and then that it was carried out during that period.

Let me, also, Your Honor please, except to that portion of Your Honor's charge in which you stated, in substance, as I recall it, that a conspiracy is complete when the agreement is made and entered into and one act in furtherance of such conspiracy is done; on the ground that there is no evidence here of the agreement having been entered into, and, therefore, not applicable to this case.

Also, to that portion of Your Honor's charge in which you stated that the claim of the Government is that Charles A. Weed and Gurdon H. Smith entered into a conspiracy, and later, when the company was organized, it became a party to the conspiracy.

Also, to that portion of Your Honor's charge in which you stated, in substance, that, for want of confirmation by the senate of the Treaty brought back by the President from Europe, a state of war still continues and exists in this country——

The Court: The Supreme Court of the United States says that.

Mr. Hinman: —still exists in this country—between America and the Imperial German Government.

The Court: Read this——

187 Mr. Hinman: No question about it; but I have known occasionally the Supreme Court to change its mind; whether it will on this question or not I do not know; but it has been done.

Also, Your Honor please, we except to that portion of Your Honor's charge to the effect that wearing apparel is a necessary and is included within the provisions of Section 1 of the Lever Act, and that an unjust rate or charge in handling or dealing in such merchandise at retail is a criminal offence.

Also, to that portion of Your Honor's charge in which you stated, in substance, that the rule in negligence cases, when a man doubts —or fails to do what the ordinarily careful and prudent man would do or not do—is applicable to this case.

Also, to that portion of Your Honor's charge in which reference was made to the fact that merchants usually keep books and that no books are here.

Also, to that portion of Your Honor's charge in which you leave to the jury the question as to whether the profits on the articles referred to in the indictment—profits charged or profits made—constitute a crime or a criminal offence.

Also, to that portion of Your Honor's charge in which you stated, in substance, that we have nothing here in exactness as to the profits that the defendants made in the year 1919—or, perhaps the year 1919 wasn't there in the charge.

Also, to that portion of Your Honor's charge in which you said, in substance, that we have nothing here in exactness as to the profits that the defendants have made.

Also, Your Honor please, we except to the language used by Your Honor in your charge, that the second count of the indictment is a direct violation of the Lever Act.

The Court: It is charged as a direct violation.

Mr. Hinman: I think that is it—then I withdraw the exception.

I also except to that portion of Your Honor's charge in
188 which you stated, in substance, that Congress had the inherent power to enact this so-called Lever Act and that such Act is constitutional.

Also, to that portion of Your Honor's charge in which you stated, in words or substance, that we have no one here engaged in this business or line of business to say what is a fair rate or charge for doing this class or kind of business.

We also except to that portion of Your Honor's charge in which the Court referred to the twenty-sixth item of articles mentioned in Count 1 of the indictment as necessaries—raise the same question.

The jury is directed to retire to the jury room by the Court.
Jury retires in charge of an officer.

Friday, May 28, 1920, the jury, upon returning into Court, returned this verdict:

The Foreman: We find all the defendants in this case guilty on counts one, two, three, four, five, seven and eight as charged in the indictment.

The Court: You mean the defendants on trial?

The Foreman: In this case I say that.

The Court: The defendants on trial in this case?

The Foreman: The defendants on trial in this case.

The Clerk: Gentlemen, hearken to your verdict as the Court has it recorded. You say you find the defendants on trial here guilty of counts one, two, three, four, five, seven and eight in this indictment and so say you all?

The Jury: We do.

Mr. Hinman: On behalf of the defendants and each of them I move to set aside the verdict and for a new trial on the grounds:

189 First, that the verdict is contrary to law.

Second, that it is contrary to the evidence.

Third, that there is no evidence to sustain or support the verdict.

Fourth, upon all the exceptions taken during the trial. As to each of the defendants I make that motion.

Motion denied. Exception to the defendants.

Mr. Hinman: On behalf of the defendants I move for an arrest of the judgment in order that we may apply for a writ of error on the same grounds.

Denied. Exception.

The Court thereupon upon motion of the counsel for the plaintiff, imposed upon the defendants, Weeds Inc. and Gurdon H. Smith a fine of $1,000 on the first count, a fine of $5,000 each on the second, third, fourth, fifth, seventh and eighth counts.

The Court thereupon fixed bail at $1,000.

The Court thereupon continued the term for three months to enable the defendants to prepare a bill of exceptions.

The foregoing contains all the evidence in the case.

190 *Stipulation Regarding Exhibits.*

It is stipulated and agreed by the attorneys for the respective parties to the above entitled action, that in lieu and instead of printing the documentary Exhibits in this case at length the following statement of the substance thereof be printed, viz:

Plaintiffs' Exhibits.

No. 1, Certificate of Incorporation of "Weeds Inc." (Certified copy.)

Dated December 26, 1919, signed and acknowledged December 26, 1919, by Charles A. Weed, Gurdon H. Smith and Charles W. Weed, filed and recorded in the office of the Secretary of State of New York on December 30, 1919, filed and recorded in the Clerk's office of the County of Broome, New York, December 31, 1919, at 10 o'clock a. m., in Book 8 of Register of Corporations page 244.

Name of proposed corporation—"Weeds Inc."

Purposes (substance of) to manufacture, buy, sell, deal in clothing, haberdashery and wearing apparel of every kind and nature and in other articles which may be advantageously handled in connection therewith, manufacture, purchase, sell, export and import all woolen, cotton, silk and other fibers, materials etc. used in the manufacture of clothing and wearing apparel.

Amount of capital stock, Two Hundred and Fifty Thousand Dollars, consisting of Twenty-five Hundred shares of One Hundred Dollars par value each.

Amount of capital with which the corporation will begin business, One Hundred Fifty Thousand Dollars.

Principal business office, Binghamton, Broome County, New York.

191 Duration—perpetual.

Number of directors—five, viz: Charles A. Weed, 2 Millard Ave., Binghamton, New York, Stewart W. Smith, 76 Riverside Drive, Binghamton, New York, Gurdon H. Smith, 76 Riverside Drive, Binghamton, New York, Walter B. Daymon, 119 Leroy Street, Binghamton, New York, Charles W. Weed, 2 Millard Avenue, Binghamton, New York.

Subscribers and shares of stock subscribed—

Charles A. Weed, one.

Gurdon H. Smith, one.

Charles W. Weed, one.

Any person otherwise qualified may be elected as director without being a stockholder.

Organization tax of One Hundred Twenty-five Dollars paid to State Treasurer before filing.

Certificate of A. B. Parker, Deputy Secretary of State, dated May 3, 1920, attached showing that the Exhibit is a correct transcript of the original.

Exhibit 2—Sales slip dated 1/8/1920, showing sale that day to J. H. Nelson, 43 Main Street, of man's suit 38040 for $40.00, sold by salesman No. 7. Has written thereon over the initials "E. P. M." the words "correctness verified" and the cost of the suit, $20.00.

Exhibit 3 and Exhibit 96 (duplicates)—Copy sales ticket dated 1/9/20, showing sale to Dr. S. J. Nunn, 324 Chenango Street, suit 38945 for $45.00, suit 20040, $40.00, suit 23945, $45.00, (footed) $130.00. Over the initials "E. P. M." appear the words "Correctness verified" and the cost of the three suits is indicated as $23.50, $12.10 and $28.50 respectively. (For explanation as to mistake in giving cost of the suit 20040 at $12.10 instead of $21.80, the correct average cost, see testimony of the witness Euleta McCarthy, page —.)

192 Exhibit 4, sales slip dated 1/31/20, shows sale to B. Perder, 33 Edward Street, by salesman No. 7, suit 22050 for $44.50

Cash	$44.50
	15.00
	$29.50
	20.00
C. O. D.	$9.50

Over the initials "E. P. M." appear the words "cost $17.82 correctness verified."

Exhibit 5, copy of sales slip dated 1/29/20 showing sale to A. M. Pierson, 149 Susquehanna Street of man's suit 30535 for $29.50, sold by salesman No. 10. Above the initials "E. P. M." appear the words "cost $11.78 correctness verified."

Exhibit 112, sales slip dated 3/3/20, showing sale to T. B. Crary, 315 Main Street (by son G. B. Crary), man's suit 35900 for $60.00. Over the initials "E. P. M." appear the words "cost $32.25 correctness verified.

Exhibit 117, invoice from Alfred Decker & Cohn, Chicago, Illinois, dated February 13, 1918 of various suits including the following item—

Lot No.	Quantity.	Description.	Price.	Extension.
6182-65 A. D. & C.	4	Suits.	$21.65	$85.00

Weeds' Lot Number 78435.

Defendants' Exhibits.

Exhibit 6, card relating to lot A 900-12¾ purchased from Munves & Berlin, carded 8/21/19, quantity 18, shows various sales between 10/25/19 and 3/27/20. Quantity remaining on hand 5.

Exhibit 8, card relating to lot B 225-875 (transfer lot) carded 2/11/20, quantity 109, shows various sales between 2/12/20 and 4/24/20. Quantity remaining on hand, 64.

193 Exhibit 9, forty sales slips numbered 1 to 40 inclusive, shows sales from lot B 225-875 at $4.38 between February 12, 1920 and February 28, 1920 inclusive, and some at $4.65 on and subsequent to March 4, 1920. None at $8.75;

Also shows sales from lot B 225-675 at $3.38 from February 12, 1920 to February 28, 1920 inclusive, and some at $3.65 on and subsequent to March 4, 1920. None at $6.75;

Also shows one sale of two articles from lot B 225-275 at $1.38 on February 19, 1920, viz: for $2.75 for the two articles. None at $2.75.

Exhibit 16 is card relating to B 225-675 (transfer lot) carded 2/11/20, quantity received 102, showing various sales between 2/11/20 and 4/20/20. Quantity remaining on hand 60.

Exhibit 17, sales slips numbered from 1 to 35 inclusive, showing sales from lot B 225-675 at $3.38 from February 11 to February 21 inclusive, and some at $3.65 on and subsequent to March 4, 1920. None at $6.75.

Exhibit 24 is card relating to B 225-275 (transfer lot) carded 2/11/20, quantity received 63 showing various sales between 2/11/20 and 3/6/20. Quantity remaining on hand 12.

Exhibit 29 is card relating to lot D. 1-350 transfer lot, carded 1/27/20, quantity 230, shows various sales between 1/28/20 and 5/6/20. Quantity remaining on hand 180.

Exhibit 30 is card relating to lot D1-850 (transfer lot), carded 1/27/20, quantity 91, shows various sales between 2/3/20 and 3/6/20. Quantity remaining on hand 60.

Exhibit 37 is card relating to lot E2-350, carded 9/2/19, quantity 39 (on 9/26/19 four more were added) shows various sales between 10/15/19 and 2/12/20. Quantity remaining on hand, 35.

Exhibit 39 is card relating to lot E2-4, carded 5/1/19, quantity 21 shows various sales between 10/15/19 and 3/8/20. Quantity on hand, 15.

194 Exhibit 41 is card relating to lot C8-6, carded 8/12/19 quantity 38, shows various sales between 9/13/19 and 3/1/20. Quantity remaining on hand 15.

Exhibit 43 is card relating to lot C6-6, carded 9/2/19, quantity 37, shows various sales between 9/18/19 and 2/17/20. Quantity remaining on hand, 17.

Exhibit 45 is card relating to lot S7-2, carded on or before 8/9/19, quantity 69, shows various sales between 8/9/19 and 4/10/20. Quantity remaining on hand 28.

Exhibit 47 is card relating to lot S2-165, carded on or before 1/2/20, quantity 115, shows various sales between 1/2/20 and 3/11/20. Quantity remaining on hand, None.

Exhibit 48 is card relating to lot S2-165, carded 9/23/19, quantity 59 (20 added on 10/1/19; 30 added on 10/23/19; 47 added 11/8/19; 36 added 12/6/19; 24 added 12/18/19) shows various sales between 10/7/19 and 12/30/19. Quantity remaining on hand 115.

Exhibit 50 is card relating to lot S1-5, carded on or before 4/17/20. Quantity, 75, shows 2 sales on 4/17 and 4/22/20. Quantity remaining on hand, 73.

Exhibit 55 is card relating to lot S 11-5, carded 5/1/19, quantity 51 (1 added 5/7/19), shows sales between 5/13/19 and 3/—/20. Quantity remaining on hand, 13.

Exhibit 56 is card relating to lot S 11-5, carded 3/18/19, quantity 42 (24 added on 4/10/19) shows various sales between 3/20/19 and 4/30/19. Quantity remaining on hand, 51.

Exhibit 58, card relating to lot S 9-3 carded 5/1/19, quantity 46 (30 added 9/16/19; 27 added 10/10/19) shows various sales between May 2, 1919 and 4/16/20. Quantity remaining on hand, 40.

Exhibit 59 is card relating to lot S 9-3, carded on or before
195 11/27/18, quantity 72, shows various sales between November 27, 1918 and April 5, 1919. Quantity remaining on hand, 46.

Exhibit 62 is card relating to lot S 6-10 carded 10/23/19, quantity 15, shows various sales between 11/13/19 and 1/17/20. Quantity remaining on hand, 3.

Exhibit 64 is card relating to lot S 1-12, carded 5/1/19. Quantity 7, (19 added on 12/10/19 and 1 added on 1/2/20) shows various sales between 6/20/19 and 2/6/20. Quantity remaining on hand, 6.

Exhibit 65 relates to lot S 1-12, carded 2/13/19, quantity 30 (18 returned 2/19/19) shows various sales between 2/20/19 and 4/22/19. Quantity remaining on hand, 7.

Exhibit 67 is card relating to lot Z 1-18, carded 12/5/19, quantity 36, shows various sales between 12/9/19, and 2/6/20. Quantity remaining on hand, 29.

Exhibit 69 is card relating to lot B 4-12, carded October 11, 1919, quantity, 12, shows various sales between November 1, 1919 and April 24, 1920. Quantity remaining on hand, 8.

Exhibit 71 is card relating to lot A1-10 carded 2/23/20, quantity 24 (12 added 3/2/20 and 24 added 3/15/20) shows various sales between 3/4 and 4/24/20. Quantity remaining on hand, 43.

Exhibit 74, is card relating to lot W1-1, carded 9/19/19, quantity 8. Shows various sales between 11/12/19 and 1/15/20 Quantity remaining on hand, 1.

Exhibit 77 is card relating to lot 363-60, carded 11/13/19, quantity 16, shows various sales between 12/27/19 and 4/27/20. Quantity remaining on hand, 4.

Exhibit 79 is card relating to lot 323-75, carded 12/9/19, quantity, 3, shows two sales on 1/23/20. Quantity remaining on hand, 1.

Exhibit 82 is card relating to lot 315-50 (transfer lot), carded 9/6/19, quantity, 11, shows various sales between 10/25/19
196 and 2/18/20. Quantity remaining on hand 4.

Exhibit 86, is card relating to lot 318-75 (transfer lot) carded 9/16/19, quantity 15, shows various sales between 10/15/19 and 2/14/20. Quantity remaining on hand, 8.

Exhibit 89 is card relating to lot 380-40, carded 12/12/19, quantity, 8, shows various sales between 12/29/19 and 4/23/20. Quantity remaining on hand, 2.

Exhibit 90 is sales slip dated 1/8/20, showing sale to J. H. Nelson, 43 Main Street, by salesman No. 7, suit 38040 for $40.00.

Exhibit 93 is card relating to lot 20040 (transfer lot), carded 5/1/19, quantity, 19, shows various sales between 5/10/19, and 1/9/20. Quantity remaining on hand, 7.

Exhibit 94 is card relating to lot 200-40 (transfer lot), carded on or before 2/10/19, quantity, 35, shows various sales between 2/15/19 and 4/29/19. Quantity remaining on hand, 19.

Exhibit 97 is card relating to lot 389-45, carded 12/29/19, quantity, 7, shows various sales between 1/9/20 and 2/17/20. Quantity remaining on hand—none.

Exhibit 99 is card relating to lot 200-50 (transfer lot) carded 9-8/19, quantity, 2, shows one sale on 1/31/20. Quantity remaining on hand, 1.

Exhibit 101, card relating to lot 305-35 carded August 20, 1919, quantity 26, shows various sales between August 23, 1919, and February 21, 1920. Quantity remaining on hand, 3.

Exhibit 102, card relating to lot 958-25 (transfer lot), carded September 6, 1918, quantity, 33 (6 added September 13, 1918)

shows various sales between September 27, 1918 and February 22, 1919. Quantity remaining on hand, 17.

Exhibit 103, card relating to lot 164-30 (transfer lot) carded September 6, 1918, quantity 20, (3 added September 13, 1918), shows various sales between September 28, 1918 and March 7,
197 1919. Quantity remaining on hand, 9.

Exhibit 109 is sales slip dated 1/31/20 showing sale to B. Perder of 33 Edward Street by salesman No. 7 of suit No. 22050 for $44.50. Two cash payments aggregating $35.00, C. O. D. the balance of $9.50. (The cost $17.82 noted thereon by the witness Euleta McCarthy after the sale.) (This is the Exhibit from which plaintiffs' Exhibit 4 for identification was copied.)

Exhibit 110 is sales slip dated 1/29/20 showing sale to A. M. Pierson, 149 Susquehanna Street by salesman No. 10 of suit 30535 for $29.50 (this is the slip from which plaintiffs' Exhibit 5 was copied).

Exhibit 111 is sales ticket dated 3/3/20, showing sale to T. B. Crary (by son G. B. Crary) by salesman No. 7 of suit No. 35960 for $60.00. (This is the ticket from which plaintiffs' Exhibit 112 for identification was copied.)

Exhibit 106 is a placard on stiff cardboard about fourteen by twenty-two and a half inches in size, with the following printed thereon in conspicuous letters and figures in red:

Alteration Sale.

Boys' Sweaters.

$13.50	Sweaters	
$10.00	"	$9.75
$8.50	"	$7.75
$7.50	"	$6.75
$5.00	"	$4.75
$3.50	"	$3.75
		$2.55

198 *Defendants' Exhibits for Identification Excluded by the Court.*

Exhibit 25, sales slips numbered from 1 to 36 inclusive, showing sales from lot B 225275 at $1.38 from February 11 to February 21 inclusive and $1.35 on and subsequent to March 4, 1920. None at $2.75.

Exhibit 31 is 31 sales slips showing various sales from lot D 1-850 (sweaters) all at $4.25 except four at $6.75. None at $8.50.

Exhibit 75 consist of four sales slips showing four sales of lot W 1-1 (cap) at 69 cents.

Exhibit 80 is sales slips showing sales of two suits, lot 32375 at $54.50.

Exhibit 85 consists of 7 sales slips showing five sales between October 25, 1919 and November 21, 1919, from lot 31550 overcoat at $50.00, and two sales from such lot on February 16 and February 18, 1920, at $25.00.

Exhibit 92 is an invoice of Stein-Bloch Company dated December 12, 1919, for 13 suits at $20.00 each, lot numbers (Weeds') 38040 and 38140.

Exhibit 104 is card relating to lot 359-60, carded 11/13/19 quantity, 9, shows various sales between 1/8/20 and 4/27/20. Quantity remaining on hand, 1.

Exhibit 105 is invoice of Alfred, Decker & Cohn, Chicago, dated November 13, 1919, referring (among other items) to the following —9 suits, lot number (Weeds') 35960 at $32.25, amounting to $290.25.

Exhibit 107 is wholesale price list No. 7 of the Duofold Health Underwear Company, effective March 11, 1918, giving, (among other things) the wholesale prices per dozen of No. 622 superior quality medium weight shirts and drawers at $23.75; retail prices
199 of same per garment, $3.00; union suits, wholesale prices per dozen, $43.50, retail prices per garment, $5.75; No. 724, best quality medium heavy weight shirts and drawers, wholesale price per dozen, $30.75, retail prices per garment, $4.00.

Exhibit 108 is wholesale price list No. 9 of Duofold Health Underwear Company effective August 1, 1919, sets forth, among other things, No. 622 superior quality medium weight shirts and drawers, wholesale price per dozen, $28.00, retail prices per garment $3.50; union suits wholesale per dozen, $50.00, retail per garment, $6.25. No. 724 best quality medium heavy weight shirts and drawers, wholesale prices per dozen $34.50, retail prices per garment $4.25; union suits $59.25, wholesale per dozen, $7.50 retail per garment.

Exhibit 114 is an invoice of the Ford Clothing Company dated November 20, 1919, of 40 overcoats, lot number (Weeds') 31540 at $37.50 each.

Exhibit 115 is an invoice of Ford Clothing Company dated November 7, 1919, for 12 suits, lot number (Weeds') 36055, 36155, and 36255 respectively at $40.50 each.

Exhibit 116 is invoice of Ford Clothing Company dated September 2, 1919, for 15 overcoats, lot number (Weeds') 33740 at $29.50 each.

Exhibit 15 is a placard on heavy cardboard about fourteen by twenty-two and a half inches in size, with the following in conspicuous letters and figures in red:

Alteration Sale.

$1.45	Rompers	.....	89¢
$2.75	Wash Suits	.....	$1.38
3.75	" "	.....	1.88
4.75	" "	.....	2.38
5.75	" "	.....	2.88
6.75	" "	.....	3.38
7.75	" "	.....	3.88
8.75	" "	.....	4.38
9.75	" "	.....	4.88

200 Exhibit 113 is financial statement prepared by bookkeeper Hein. It was not offered in evidence.

All of the remaining exhibits of the defendants related to articles of wearing apparel.

It is further stipulated that the production of the articles of wearing apparel whether received in evidence or merely marked for identification and excluded. is hereby waived.

Dated September 10th, 1920.

FRANK J. CREGG,
Special Assistant to U. S. Attorney General,
Attorney for Plaintiff.
HINMAN, HOWARD & KATTELL,
Attorney- for Defendants.

201 *Stipulation for Settlement of Bill of Exceptions.*

It is hereby stipulated that the foregoing bill of exceptions contains all the evidence given and the proceedings had upon the trial of this action, and that the same may be settled, signed and sealed by the Court and Judge who presided upon the trial of the action, without notice, and ordered to be filed.

Dated September 10, 1920.

FRANK J. CREGG,
Special Assistant to the Attorney General of the United States,
Attorney for Plaintiff.
HINMAN, HOWARD & KATTELL,
Attorneys for Defendants.

202 And now in furtherance of justice and that right may be done, the defendants Weeds Inc. and Gurdon H. Smith, tender and present the foregoing as their bill of exceptions in this case to the action of the Court, and pray that the same may be settled and sealed by the Court and made a part of the record and the same is accordingly done this 13th day of September, 1920.

MANTON,
U. S. Judge.

Endorsed: Bill of Exceptions. Filed Sep. 14, 1920. C. W. Higgison, clerk.

203 To the Honorable Supreme Court of the United States:

WEEDS, INC., and GURDON H. SMITH, Plaintiffs in Error,

vs.

UNITED STATES OF AMERICA, Defendant in Error.

And now come Weeds, Inc., and Gurdon H. Smith, the plaintiffs in error, and pray for a reversal of the judgment of the District Court of the United States for the Northern District of New York made on or about the 28th day of May, 1920, whereby said plaintiffs in error were convicted upon an indictment charging them with violations of the Act of Congress entitled, "An Act to Provide further for the National Security and Defense by encouraging the production, conserving the supply, and controlling the distribution of food products and fuel," approved August 10, 1917, as amended by an Act of Congress entitled an Act to amend said Act, approved October 22, 1919, and whereby the said plaintiffs in error were sentenced and required to pay fines in the sum of Thirty-one Thousand Dollars ($31,000).

HINMAN, HOWARD & KATTELL,
Attorneys for Plaintiffs in Error,
Security Mutual Life Building,
Binghamton, New York.

(Endorsed:) Prayer for Reversal. Filed Aug. 6, 1920. C. W. Higgison, Clerk.

204 To the Honorable Edward Douglass White, Chief Justice of the Supreme Court of the United States, and to the Associate Justices of the Court:

The petition of Weeds, Inc., a corporation organized under the laws of the State of New York and having its principal place of business in the City of Binghamton in the County of Broome and State of New York, in the northern district of said State, and of Gurdon H. Smith, also of said City of Binghamton, respectfully shows:

1. That at a Term of the United States District Court for the Northern District of New York begun and held in the United States Court rooms in the City of Syracuse, in said District, commencing on the 6th day of April, 1920, an indictment was found against your petitioners and against one Charles A. Weed, charging said Weed and your petitioners upon eight Counts with violations of the provisions of the Act of Congress entitled, "An Act to Provide Further for the National Security and Defense by encouraging the production, conserving the supply, and controlling the distribution of food products and fuel," approved August 10, 1917, as amended by the Act of

Congress entitled an Act to amend the Act entitled as above, approved October 22, 1919.

2. That said indictment was moved for trial against said petitioners only at said Term of Court, and that upon said trial said petitioners were convicted upon all the Counts of said indictment except the Count numbered Six, and that on or about the 28th day of May, 1920 your petitioners were sentenced to pay fines aggregating Thirty-one Thousand Dollars ($31,000) and that judgment for said conviction was thereupon made.

205 3. That the Constitutionality of the said law was drawn in question in that by a demurrer to said indictment your petitioners claimed and stated that said law was null and void and of no effect because it was in contravention of the provisions of the Constitution of the United States in that it deprived your petitioners, defendants, of the equal protection of the laws and of their liberty without due process of law, all contrary to the provisions of Article V of the Amendments of the Constitution of the United States, and further in that the said law is so general, speculative, uncertain and indefinite in its terms and provisions that it does not define or specify what facts or acts shall constitute a violation thereof or an offence thereunder, and does not enable a person to determine, decide or know in advance what specific act or acts, thing or things, are prohibited thereby or are permitted thereunder, but leaves it to be determined after the event or act whether such event or act was or was not a violation thereof, thereby not only making it possible but inevitable that an act committed or thing done in one locality may be legal, innocent, and valid, while the same act committed or thing done in another locality under like circumstances and at the same time or even in the same locality and by the same person will be held to be a criminal offence, all in violation of the provisions of Articles V and VI of the amendments of the Constitution of the United States; that said demurrer was overruled and that an exception thereto was taken by your petitioners, and that upon said trial motions to dismiss said indictment and each of the Counts thereof were made upon the same grounds and were denied, to all of which your petitioners, defendants, excepted.

4. That in the records, proceedings and decisions in said cause manifest errors have occurred greatly to the damage of
206 your petitioners defendants in said cause, all of which fully appear in the records and proceedings of the case and are specifically set forth in the assignment of errors filed herewith.

Wherefore, your petitioners pray that a writ of error may issue and that they may be allowed to bring up for review before the Supreme Court of the United States the said judgment, and that a transcript of the record, proceedings and papers upon which the same was rendered, duly authenticated, be ordered sent to the Supreme Court of the United States at Washington, D. C. under the rules of such Court in such cases made and provided, and that the same may be by this honorable Court inspected and corrected in accordance with

law and justice; and that your petitioners may have such other further or different relief in the premises as may be just.

WEEDS, INC.,
By GURDON H. SMITH,
Treasurer.
GURDON H. SMITH.

HINMAN, HOWARD & KATTELL,
Petitioners' Attorneys,
Security Mutual Life Bldg.,
Binghamton, N. Y.

STATE OF NEW YORK,
County of Broome, ss:

Gurdon H. Smith being duly sworn, deposes and says that he is one of the petitioners named in and making the foregoing petition, and is an officer of Weeds, Inc., the other of said petitioners, to wit, its Treasurer; that the foregoing petition is true to his own knowledge except as to the matters therein stated to be alleged upon information and belief, and that as to those matters he believes it to be true.

GURDON H. SMITH.

Subscribed and sworn to before me this 31st day of July, 1920.
[Notarial seal.] LAVERNE W. TWINING,
Notary Public.

Indorsed: Petition Filed Aug. 6, 1920. C. W. Higginson, Clerk. Rec'd on application for Writ of Error. Geo. W. Ray, U. S. District Judge.

207 United States District Court, Northern District of New York.

THE UNITED STATES OF AMERICA, Plaintiff,

vs.

WEEDS, INC., and GURDON H. SMITH, Defendants.

Know all men by these presents that we, Weeds, Inc., a corporation organized under the laws of the State of New York and having its principal office at the City of Binghamton in the County of Broome and State of New York, and Gurdon H. Smith, also of said City of Binghamton, as principals, and Charles A. Weed and Kate S. Weed of the same place, as sureties, are held and firmly bound unto the United States of America in the sum of Thirty-five Thousand Dollars ($35,000) lawful money of the United States, to be paid to the United States of America, to which payment well and truly to be made we bind ourselves, and each of us jointly and severally, and each of our respective heirs, executors, and administrators, firmly by these presents.

Sealed with our seals. Dated this tenth day of July, 1920.

Whereas, The above Weeds, Inc. and Gurdon H. Smith are about to prosecute a writ of error to the Supreme Court of the United States to reverse the judgment of the District Court of the United States for the Northern District of New York in the above entitled cause, and to apply for an order to provide that said writ of error shall operate as a supersedeas:

Now, therefore, the condition of this obligation is such that if the above named Weeds, Inc. and Gurdon H. Smith shall prosecute said writ of error to effect and answer all damages and costs, if they
208 fail to make good their plea, then this obligation shall be void; otherwise, the same shall be and remain in full force and effect.

[Seal of Weeds, Inc., Binghamton, N. Y. Incorporated 1919.]

WEEDS, INC.,
By CHARLES A. WEED,
President.

GURDON H. SMITH. [SEAL.]
CHARLES A. WEED. [SEAL.]
KATE A. WEED. [SEAL.]

STATE OF NEW YORK,
County of Broome, ss:

On this 12th day of July, 1920, before me personally appeared Gurdon H. Smith, Charles A. Weed and Kate S. Weed, to me known and known to me to be the same persons described in and who executed the foregoing instrument, and they duly acknowledged to me that they executed the same.

[Seal of Joseph S. O'Neil, United States Commissioner, Northern Dist. of N. Y.]

JOSEPH S. O'NEIL,
U. S. Commissioner.

209 STATE OF NEW YORK,
County of Broome, ss:

On this 12th day of July in the year 1920, before me personally came Charles A. Weed, to me known, who, being by me duly sworn, did depose and say: that he resides in Binghamton, Broome County, New York, that he is the President of Weeds, Inc., the corporation described in and which executed the foregoing instrument; that he knows the seal of said corporation; that the seal affixed to said instrument is such corporate seal; that it was so affixed by order of the Board of Directors of said corporation, that he signed his name thereto by like order.

[Seal of Joseph S. O'Neil, United States Commissioner, Northern Dist. of N. Y.]

JOSEPH S. O'NEIL,
U. S. Commissioner.

STATE OF NEW YORK,
County of Broome, ss:

Charles A. Weed and Kate S. Weed, the sureties named in and who executed the foregoing bond, being severally duly sworn each for himself, deposes and says, that he is a resident of the State of New York and a free holder in said state, and is worth Thirty-five Thousand Dollars ($35,000.00) over all the debts and liabilities which he owes or has incurred, and exclusive of property exempt by law from levy and sale under an execution.

CHARLES A. WEED. [SEAL.]
KATE S. WEED. [SEAL.]

Severally subscribed and sworn to before me this 12th day of July, 1920.

[Seal of Joseph S. O'Neil, United States Commissioner, Northern Dist. of N. Y.]

JOSEPH S. O'NEIL,
U. S. Commissioner.

210 United States District Court, Northern District of New York.

THE UNITED STATES OF AMERICA, Plaintiff,

vs.

WEEDS, INC., and GURDON H. SMITH, Defendants.

Deposition Taken Before Joseph S. O'Neil, U. S. Commissioner, in the Matter of the Approval of the Supersedeas Bond Given in the Above-entitled Cause on the 12th Day of July, 1920.

KATE S. WEED, being duly sworn by the Commissioner and examined by Harvey D. Hinman, testified as follows:

Q. Mrs. Weed, do you reside in Binghamton?
A. I do.
Q. Are you the owner of the block in which Weeds, Inc., are conducting their clothing business in this city?
A. Yes.
Q. What is the number of that block?
A. 83 and 85 Court Street in the City of Binghamton, N. Y.
Q. Is that encumbered?
A. Yes.
Q. What is it mortgaged for?
A. $85,000.00.
Q. What corporation holds the mortgage on that property?
A. The Binghamton Savings Bank of the City of Binghamton, New York.

211 Q. Is that the only lien and encumbrance there is against it?

A. Yes.

Q. Do you owe anything outside of what you owe on that mortgage?

A. No.

KATE S. WEED.

Subscribed and sworn to before me this 12th day of July, 1920.

[Seal of Joseph S. O'Neil, United States Commissioner, Northern Dist. of N. Y.]

JOSEPH S. O'NEIL,
U. S. Commissioner.

212 United States District Court, Northern District of New York.

THE UNITED STATES OF AMERICA, Plaintiff,

vs.

WEEDS, INC., and GURDON H. SMITH, Defendants.

Deposition Taken Before Joseph S. O'Neil, U. S. Commissioner, in the Matter of the Approval of the Supersedeas Bond Given in the Above-entitled Cause on the 12th day of July, 1920.

C. A. Weed, being duly sworn by the Commissioner and examined by Harvey D. Hinman, testified as follows:

Q. Mr. Weed, are you husband of Kate S. Weed?

A. I am.

Q. What is the size of that block, 83 and 85 Court Street in the City of Binghamton, New York, occupied by Weeds, Inc.?

A. 45 x 100 feet.

Q. Is that located on the principal business street in the City of Binghamton?

A. It is.

Q. What encumbrance, if anything, except the mortgage to the Binghamton Savings Bank?

A. It is not.

CHAS. A. WEED.

Subscribed and sworn to before me this 12th day of July, 1920.

[Seal of Joseph S. O'Neil, United States Commissioner, Northern Dist. of N. Y.

JOSEPH S. O'NEIL,
U. S. Commissioner.

213 United States District Court, Northern District of New York.

THE UNITED STATES OF AMERICA, Plaintiff,

vs.

WEEDS, INC., and GURDON H. SMITH, Defendants.

Deposition Taken Before Joseph S. O'Neil, U. S. Commissioner, in the Matter of the Approval of the Supersedeas Bond Given in the Above-entitled Cause on the 12th Day of July, 1920.

GEORGE F. O'NEIL, being duly sworn by the Commissioner and examined by Harvey D. Hinman, testified as follows:

Q. How long have you known this store, 83 and 85 Court Street?
A. Since it was built.
Q. How many years is that?
A. Over 40 years.
Q. You know its condition?
A. Yes.
Q. Are you familiar with the values of real estate in the City of Binghamton?
A. Yes, sir.
Q. How many different parcels of real estate have you bought and sold in the City in the last twenty-five years?
A. Fifty or sixty—maybe more.
214 Q. Do you own business blocks on this same street?
A. Yes, sir.
Q. Know the renting value of those properties?
A. Yes, sir.
Q. What do you say is the fair market value of that block at 83 and 85 Court Street being occupied by Weeds, Inc.?
A. I valued them a year ago at $85,000 apiece, a prospective buyer wanted them.
Q. You say that is a fair market value today?
A. $85,000 to $90,000 apiece.

GEORGE F. O'NEIL.

Subscribed and sworn to before me this 12th day of July, 1920.

[Seal of Joseph S. O'Neil, United States Commissioner, Northern Dist. of N. Y.]

JOSEPH S. O'NEIL,
United States Commissioner.

215 United States District Court, Northern District of New York.

THE UNITED STATES OF AMERICA, Plaintiff,
vs.
WEEDS, INC., and GURDON H. SMITH, Defendants.

Deposition Taken Before Joseph S. O'Neil, U. S. Commissioner, in the Matter of the Approval of the Supersedeas Bond Given in the Above-entitled Cause on the 12th Day of July, 1920.

PETER MCMANUS, being duly sworn by the Commissioner and examined by Harvey D. Hinman, testified as follows:

Q. Mr. McManus, what is your business?
A. I am an attorney at law of the State of New York, and practicing as such in the City of Binghamton.
Q. How many years have you lived in Binghamton?
A. Twenty.
Q. During those years you have bought and sold, particularly recently, different parcels and pieces of real estate in the City of Binghamton so that you know the value of business properties here?
A. Yes.
Q. And have you known the prices at which other properties have been sold here during that period?
A. Yes.

216 Q. Are you familiar with the condition and location of the store or block of real estate known as 83 and 85 Court St., this city?
A. I am.
Q. What do you say as to the location of that property?
A. I would say that it was one of the best locations in the City of Binghamton, both as to street and side of street.
Q. And are you familiar with rentals being paid for property of that character in the City of Binghamton?
A. Yes, sir.
Q. What do you say is fair market value of this store and block numbered 83 and 85 Court St., which is now occupied by Weeds, Inc., as a clothing store between a willing seller and willing buyer?
A. I would say $175,000 to $180,000. During the last few years I have known the prices paid on the sale of 4 or 5 other pieces of property on the same street on which these two stores are located and which are used for business purposes, and I base my opinion of the value of this property on the prices which I personally know those other blocks have brought within the past year, and of the rentals which are being paid for similar property in the street.

PETER J. McMANUS.

Subscribed and sworn to before me this 12th day of July, 1920.

[Seal of Joseph S. O'Neil, United States Commissioner, Northern Dist. of N. Y.]

JOSEPH S. O'NEIL,
U. S. Commissioner.

217 United States District Court, Northern District of New York.

THE UNITED STATES OF AMERICA, Plaintiff,

vs.

WEEDS, INC., and GURDON H. SMITH, Defendant.

Deposition Taken Before Joseph S. O'Neil, U. S. Commissioner, in the Matter of the Approval of the Supersedeas Bond Given in the Above-entitled Cause on the 12th Day of July, 1920.

HIRAM MINTZ, being duly sworn by the Commissioner and examined by Harvey D. Hinman, testified as follows:

Q. What is your occupation?

A. I am engaged in the Real Estate Business in the City of Binghamton, N. Y. I have been so engaged for the last 12 years.

Q. Have you bought and sold Real Estate and known of Real Estate being bought and sold in the City of Binghamton and the prices paid for such property including business blocks or buildings on Court Street in the City of Binghamton during the past ten years?

A. I have.

Q. Are you acquainted with the building and property known as 83-85 Court Street in the City of Binghamton, N. Y., owned by Kate S. Weed and in which Weeds, Incorporated, is conducting a clothing store?

A. Yes, sir.

Q. Do you know the market value of that property?

218 A. I do.

Q. What in your opinion is the fair market value of that property 83-85 Court Street, Binghamton, N. Y.?

A. One Hundred Seventy-five Thousand Dollars ($175,000.00).

HIRAM MINTZ.

Subscribed and sworn to before me this 12th day of July, 1920.

[Seal of Joseph S. O'Neil, United States Commissioner, Northern Dist. of N. Y.]

JOSEPH S. O'NEIL,
United States Commissioner.

219 Sealed and delivered and taken and acknowledged this 12th day of July, 1920, before me.

[Seal of Joseph S. O'Neil, United States Commissioner, Northern Dist. of N. Y.]

JOSEPH S. O'NEIL,
United States Commissioner.

Approved by—

____ ____,
Circuit Judge.

(Endorsed:) Supersedeas Bond. Bond Approved July 16/20. Manton, C. J. Filed July 17, 1920. C. W. Higginson, Clerk.

220 United States District Court, Northern District of New York.

THE UNITED STATES OF AMERICA

vs.

WEEDS, INC., and GURDON H. SMITH.

Now come the defendants in the above entitled cause and make and file this their assignment of errors:

First. The district court erred in overruling the demurrer interposed by and on behalf of each of the above named defendants

(1) to the indictment herein;

(2) to Count One of such indictment;

(3) to Count Two of such indictment;

(4) to Count Three of such indictment;

(5) to Count Four of such indictment;

(6) to Count Five of such indictment;

(7) to Count Seven of such indictment;

(8) to Count Eight of such indictment.

Second. The district court erred in denying the motion made by and in behalf of each of the defendants herein at the opening of the trial

(1) to dismiss or quash such indictment;

(2) to dismiss or quash the first Count of such indictment;

(3) to dismiss or quash the second Count of such indictment;

(4) to dismiss or quash the third Count of such indict-
221 ment;

(5) to dismiss or quash the fourth Count of such indictment;

(6) to dismiss or quash the fifth Count of such indictment;

(7) to dismiss or quash the seventh Count of such indictment;

(8) to dismiss or quash the eighth Count of such indictment.

Third. The district court erred in refusing or denying the motion made by and on behalf of each of the defendants at the close of the Governments case,

(1) to dismiss or quash such indictment;

(2) to dismiss or quash the first Count of such indictment;

(3) to dismiss or quash the second Count of such indictment;

(4) to dismiss or quash the third Count of such indictment;

(5) to dismiss or quash the fourth Count of such indictment;

(6) to dismiss or quash the fifth Count of such indictment;

(7) to dismiss or quash the seventh Count of such indictment;

(8) to dismiss or quash the eighth Count of such indictment.

Fourth. The district court erred in denying or refusing to grant the motion made by and on behalf of each of the defendants at the close of the entire case,

222 (1) to dismiss or quash such indictment;

(2) to dismiss or quash the first Count of such indictment;

(3) to dismiss or quash the second Count of such indictment;

(4) to dismiss or quash the third Count of such indictment;

(5) to dismiss or quash the fourth Count of such indictment;

(6) to dismiss or quash the fifth Count of such indictment;

(7) to dismiss or quash the seventh Count of such indictment;

(8) to dismiss or quash the eighth Count of such indictment.

Fifth. The district court erred in refusing or denying the motion made by and on behalf of each of the defendants to strike out of the case the testimony given on the trial introduced on behalf of the Government in relation

(1) to the 6th item contained in the first Count of the indictment;

(2) to the 13th item contained in the first Count of the indictment;

(3) to the 31st item of the first Count of the indictment;

(4) to the fifth Count of the indictment.

Sixth. The district court erred in refusing to allow and in denying the right of the defendants to make proof and in excluding evidence as to the increased cost of goods and merchandise purchased by them in the market between September 2, 1919 and November 20, 1919,
223 and as to the small percentage of profits which the defendants made on the cheaper lines of goods and merchandise carried, handled and dealt in by them, and as to the small percentage of increase over the purchase or cost of such merchandise to the defendants and the price at which such goods and merchandise were marked for sale and were sold by defendants during the period in question.

Seventh. The district court erred in refusing to permit the defendants to prove and in excluding their evidence tending to prove that the prices at which the articles of merchandise mentioned and described in the 7th, 8th, 9th and 10th items of the first Count of the indictment were "marked for sale," as charged in the indictment, were the prices fixed by the manufacturer of those articles at which retailers, including these defendants, were permitted to sell the same, and were the prices at which such articles were sold generally throughout the entire country

The articles referred to in said 7th, 8th, 9th and 10th items in the said first Count of the indictment and therein described as "knit goods" and "union suits" consisted of underwear manufactured by the Duofold Underwear Company and were articles known in the trade as "Duofold Underwear." The defendants, after having proven that this underwear was manufactured by the Duofold Company, that such articles were on general sale in first class clothing houses throughout the country, that the marking of the sales price mentioned in such indictment on such goods had been made by employes of defendant, some of them as early as the year 1918, long before the passage of the law under which the indictment in this case was found, then offered to prove by a competent witness and by competent evidence that the manufacturers of this merchandise or
224 underwear had a monopoly, that such manufacturers furnished from time to time to defendants and the trade printed lists showing the wholesale and also the retail prices at which these goods could be sold and the fact that dealers throughout the country followed such prices. Such evidence was objected to on behalf of the Government, excluded by the Court, and to which exception was duly taken. Had the proof been admitted, it would have been followed by proof that the retail dealers who were unwilling or declined to sell these goods on the terms fixed by the manufacturers of such goods were not permitted to handle such goods. The Court erred in excluding such evidence.

Eighth. The district court erred in refusing to permit the defendants to prove and in excluding legal and competent evidence tending to prove

(1) the general custom of clothing merchants and gents' furnishings retailers of marking the selling price of hats and other items

mentioned in and covered by the first Count of the indictment at a larger percentage over cost price than in cases of other and different classes of goods handled by such merchants and retailers;

(2) the number of the hats mentioned and described in the 19th and 20th items of the first Count of the indictment, being two lots of hats (one a lot of imported Borsalini hats, and the other a lot of expensive Dunlap or Stetson hats) which were bought by the defendants for the Fall and Winter trade of 1919 but which were on hand at the time of the trial of this action in May, 1920, and which for that reason the defendants would be obliged to carry over to another Fall and Winter season, when the styles of hats would probably change and these particular hats be of much less value;

(3) the prices at which the articles mentioned in the 20th item of the first Count of the indictment, being Dunlap or Stetson hats, were sold at retail in other clothing and gents' furnishings stores throughout the country.

Ninth. The district court erred in refusing to permit the defendants to prove and in excluding on the trial of this cause legal and competent evidence tending to prove the market value on October 22, 1919, the date when the amendment to the Lever Act took effect, of the articles of merchandise mentioned and described in the 22nd, 25th and 26th items of the first Count of the indictment, and the articles of merchandise mentioned and described in Counts Two, Three, Four, Five, Seven and Eight of said indictment.

Tenth. The district court erred in refusing to permit the defendants to prove and in excluding on the trial of this cause legal and competent evidence tending to prove the market value of the articles of merchandise mentioned and described in the 22nd, 25th and 26th items of the first Count of the indictment, and the articles of merchandise mentioned and described in Counts Two, Three, Four, Five, Seven and Eight of the indictment on October 22, 1919, the date when the amendment to the Lever Act, so-called, took effect.

At the time when such evidence was offered, the proof in the case established that all the articles of merchandise and clothing mentioned and referred to in Counts One, Two, Three, Four, Five, Seven and Eight of the indictment, and all the articles, with one or two exceptions, mentioned in and covered by the first Count of the indictment in this cause had been purchased by the defendants as early as the spring of 1919, some of them in 1918, some of them in 1917, and some of them as early as 1916 and 1915, and that all such articles of merchandise had been received at defendant's store prior to October 22, 1919, the date when the so-called amendment to the Lever Act took effect, and had been marked by the defendants as and when received at their place of business; also that each of the suits of clothes mentioned in the second, third, fourth, fifth, seventh and eighth Counts of the indictment, for the sale of which the defendants were indicted, were in court and had been marked as exhibits in the case, and that a sample of each of the

articles mentioned in the various items in the first count of said indictment was also in Court, identified, and was an exhibit in the case. On the trial, the defendants had in Court the various manufacturers of these respective articles of merchandise, one of whom, Herbert T. Stienberg, was called as a witness on behalf of the defendants; who, being first duly sworn, testified that in 1919 he was familiar with the market values of the articles of merchandise in question. He was then asked: "Do you know what the market values were at that time, October, 1919?" and he answered, "Yes, sir."

Counsel for the defendants then stated, "I offer to show by this witness the market value on October 22, 1919 of the articles of merchandise mentioned and described in subdivisions 22, 25 and 26 of Count One, and in Counts Three, Four and Eight of the indictment." The District Attorney thereupon objected to such evidence, and the Court said: "The market value of the particular item of articles, wearing apparel, on October 22, 1919, I will rule that this witness is competent to testify. I shall rule that it is not
227 competent testimony relative to the issue. Objection sustained."

Thereupon, defendants duly took exception to such ruling of the Court. Defendants' counsel then stated: "I offer to prove by this witness the same facts with reference to the various dates on which those items mentioned in the subdivisions and Counts before mentioned appear to have been sold, by the indictment." Whereupon, the Court said, "The same ruling," to which the defendants duly excepted.

Counsel for the defendants then offered evidence of the same facts as to the remaining Counts of the indictment, which evidence was likewise excluded by the Court and to which exception was duly taken.

Another manufacturer, Solomon Munves, was likewise called as a witness on behalf of defendants; and after having testified that he was a member of the firm of Munves & Berlin, who manufactured and sold to the defendant, Weeds, Inc., one of the suits mentioned in the indictment, and for the sale of which the defendants were indicted, and that he was familiar with the market value of that suit on October 22, 1919, was asked this question: "What was the market value, the wholesale market value, jobber's value or manufacturer's value of that suit October 22, 1919?" Such evidence was objected to by the District Attorney as "Incompetent, irrelevant and immaterial," which objection was sustained by the Court, to which the defendants duly took exception. Counsel for the defendants then stated to the Court that the position of the defendants was, and the evidence was offered on the theory, that inasmuch as the articles involved and for the sale of which the defendants had been indicted were purchased long before October 22, 1919,
228 when the amendment to the Lever Act took effect, Congress was without power to deprive the defendants of the right to sell such articles at a fair and reasonable advance over the market value of such articles on October 22, 1919; that defendants were not

limited to proof of the cost of the goods to them two or three years before the amendment to the Act took effect, but were entitled to show the market value of such articles on October 22, 1919, when the amendment of the Act took effect; and that otherwise the defendants would be deprived of their property and liberty to contract without due process of law. The court thereupon excluded such testimony, to which the defendants duly excepted.

Thereupon, counsel for defendants stated to the Court,

"One step further. It brings up the question in another form. "I offer to show by this witness, if your Honor please, the value, the "market value of this same lot of goods in March, 1920, that is, the "date when they" (the Government inspectors) "visited the store. "That is on the same theory and raises another question. That I "want to raise now by this offer, and that is, what the market value "was of this merchandise at the time it (the merchandise) was "marked and put on sale. It is offered on the same ground."

To which the District Attorney objected, which objection was sustained, and to which the defendants duly excepted. Thereupon, defendants' counsel stated to the Court:

"Let me also call your Honor's attention to the fact, and I put "it on the ground, that a fair construction of the Act itself does not "show any intent or purpose on the part of Congress to legislate with "reference to existing values or prices or charges. In other words, "there is nothing there indicating that they intended that this "amendment should operate or this statute should operate in the "nature of an ex post facto law."

229 To which the Court replied, "Congress intended to make an infraction of the statute which it passed, the conduct of the seller, the price he charged subsequent to the passage of, the effective date of the law." To which counsel for the defendants replied, "Your Honor will note an exception."

Thereupon, counsel for the defendants stated to the Court, "The point is, in determining what is unjust and what is unreasonable. The determining factor is whether or not that test shall be applied on the then market value or whether it will be applied to the cost," to which the court replied, "It must be applied to the position the particular defendent finds himself in." Thereupon the defendants' counsel made the following offer: "I offer to show as to each item remaining in the indictment of which complaint is made and with which we are charged, I offer to prove by competent witnesses, I have them here, the manufacturers, and I offer to prove by them the market value of each of the articles mentioned in the indictment on October 22, 1919." to which the District Attorney replied "That we object to." Defendants' counsel then stated, "Each item in count one and the others." The court then stated, "You just call up your experts that you intend to call as to values." Whereupon, defendants' counsel stated, "While these men are here you will rule the same, I don't believe but what the question is raised with

reference to all that kind of evidence." To which the Court replied, "One is as good as a dozen." Defendants' counsel then stated, "I think it is covered, but I want the last witness * * * I offer to show by Mr. Munves the replacement value to Weeds on October 22, 1919 of this particular lot." The court replied, "You did that by attempting to show the then market value." In answer to this, defendants' counsel said, "On those two dates, on
230 October 22, 1919 and in March, 1920," to which the court replied, "Yes."

Defendants' counsel then made the following offer: "I offer to show by Mr. Munves that Weeds, Inc., the defendants, on October 22, 1919 would have had to pay the prices at which those goods were marked and sold at that time; in October 22, 1919 if they had bought them in the market they would have had to pay that price." To this, the District Attorney objected, and the court said: "I will exclude that," to which defendants duly excepted. Whereupon, the defendants' counsel made the same offer as to March, 1929, to which offer the court made the same ruling and to which exception was duly taken by defendants.

Again, defendants offered to prove by legal, competent evidence the market value and replacement cost to the defendants on February 11, 1920, the date when some of the items covered by the first count of the indictment were given their "marked for sale price," which was objected to by the District Attorney "as immaterial," which objection was sustained by the Court and to which the defendants duly excepted.

At another time during the trial, defendants offered to show the market value on October 22, 1919 of the 21st item in the first count of the indictment, to wit: a cap, to which attempt the U. S. District Attorney said, "That is objected to," which objection was sustained and to which exception was duly taken by defendants.

Again, when the defendant Gurdon H. Smith, a director and vice-president of the defendant, Weeds, Inc., and the general manager of the store, was being examined as a witness in his own behalf, the following occurred:

"Question. I show you, Mr. Smith, Ex. number 78 for identification and call your attention to the fact that the 22nd item of
231 the first count in the indictment refers to men's suits lot No. 36360, cost $30.50, marked price $60, as stated in the indictment. Is this Ex. 78 one of the coats from that lot?

(Garment handed witness.)

Answer. Yes, sir.

Question. Did you purchase that suit in that lot——

The Court: Senator, what do you want to prove about this?

Mr. Hinman: I want to prove by the witness, your Honor please, that this particular lot was bought by him in the Spring of 1919 for Fall delivery; that it was delivered at the defendants' store and marked November 20, 1919; that it was an Alfred Decker & Cohn lot

of clothes; that he gave the marked selling price as it appears in the indictment; that at the time when he gave that marked selling price and it was placed on that suit of cloths in November it would have cost—that suit was worth—marked value——

The Court: That you will concede?

Mr. Cregg: Yes.

Mr. Hinman: Also by this witness——

The Court: Ask a question.

Mr. Hinman: Yes, I will do that. There won't be any question about his competency?

The Court: No.

By Mr. Hinman:

Question. What was the market value—wholesale value—of that suit and the suits in that lot on November 20, 1919 when
232 you gave the marked selling price at $60; that is, what would it have cost you to replace that suit on that day?

Objected to. Objection sustained. Exception."

Thereupon, defendants' counsel made the following offer: "I offer to show by the witness that the market, the replacement value of the men's suits covered by the 24th item of the first Count of the indictment on December 11, 1919, at the time when Mr. Smith caused the selling price to be marked $75—to be placed on the lot, was $50." Objection was made and sustained, to which exception was taken. Thereupon, defendants' counsel also offered to prove that the wholesale market value and replacement value of the lot of overcoats described in the 25th item of the first count of the indictment on August 6, 1919—the time when Mr. Smith caused the marked selling price of $50 to be placed on that lot, was $40,—to which objection was made, sustained, and exception to such ruling duly taken.

Thereupon, the following occurred:

"Mr. Hinman: I offer to prove—no question is raised as to his competency?

Mr. Cregg: Why don't you simply say you make that same offer as to each count?

Mr. Hinman: It is different values.

The Court: You have made it as to one. I think that is sufficient, anyway.

Mr. Hinman: I think that is so. Now, if your Honor please, let me make the same offer with reference to Counts Two, and I do make the same offer with reference to Counts Two, Three, Four, Five, Seven, and Eight of the indictment where actual sales were made.

233 Same objection. Objection sustained. Exception.

Mr. Hinman: Now, if your Honor please, I offer to show that the replacement of wholesale market value of the suits or articles described in and covered by Counts Two, Three, Four, Five, Seven and Eight of the indictment, on the dates when those respective articles were sold, as stated in those Counts, was greatly in excess

of the cost price—actual cost of those articles, respectively, as stated in those Counts.

Same objection. Objection sustained. Exception."

Eleventh. The district court erred in excluding the testtimony of the defendant Gurdon H. Smith as to the net profits of the defendants' business in the year 1919.

The Defendant Gurdon H. Smith, a stockholder, one of the directors, the general manager, and the secretary and treasurer of the defendant, Weeds, Inc., and who had been connected with the business ten years, was called as a witness on behalf of said defendant, Weeds, Inc., and in his own behalf, and an offer made by defendants to prove by him the net profits from the defendants' business during the year 1919. The full substance of his evidence on that question and rejected by the District Court was as follows:

"Question. What were the total sales in that store during the year 1919?

Answer. About $330,000.

Question. What were the total expenses of making those sales in that store during that year?

Question objected to in that form.

By the Court:

234 Question. Tell us what your cost of carrying on business was—first, generally—what it consists of.

Mr. Hinman: Your Honor please, may I not get the testimony——

Objection overruled.

Question. What was the total expense of making those sales in 1919, sales of $330,000?

Answer. Approximately $90,000.

Question. What was the average capital invested in the business? —No, what was the total net profit from that business in the year 1919?

Objected to in present form. Objection overruled.

By the Court:

Question. Have you a balance sheet that shows this, or are you taking this from memory?

By Mr. Hinman:

Question. Do you know of your own knowledge?

Answer. Yes.

By the Court:

Question. Do you keep books?

Answer. Not personally.

The Court: The firm, of course, I mean; does that keep books?
Answer. Pardon me.

By Mr. Hinman:

Question. Does the concern keep books?
Answer. Certainly.

By the Court:

Question. Where are those books?
Answer. In Binghamton.
Question. Still in existence?
Answer. Certainly.

By Mr. Hinman.

235 Question. Do you know of your own knowledge what the net profits of that business were in 1919?
Answer. Yes, sir.

By the Court:

Question. You say you do not keep books?
Answer. Not personally.
Question. While the information you have is what you have obtained from the books?
Answer. Yes, sir.

Mr. Cregg: I object to it as not the best evidence.
The Court: How are you going to prove that? That is the most important thing in this case from your viewpoint.
Mr. Hinman: From every point.
The Court: I would think so.
Mr. Hinman: I submit, a man who knows and there——
The Court: He does not keep the books; he does keep a system of books. He has managers who have charge of departments, and the only information he gets is what he gets as a result of looking at his books. Nobody vouching for the accuracy of those books, when every entry was made, every charge put on, and so on.
Mr. Hinman: It is not possible to prove in that way, because the bookkeeper is dead. There is no way we can prove the absolute accuracy of any books.
The Court: The books themselves.
Mr. Hinman: Books in his own favor do not prove anything, and he couldn't use them in his own favor. The bookkeeper
236 would have to testify to that and the managers.
The Court: You are wrong about that, but, assuming you are right, that contention would apply doubly strong to what the witness is trying to testify.
Mr. Cregg: He is simply trying to testify to something in the books, some calculation he saw in the books.

By the Court:

Question. Did you in any time in 1919 of your own effort keep any method of calculating your profits?

Answer. No, sir.

Question. Are you able to state from any personal knowledge of your own what were your profits in 1919?

Answer. The actual figuring, no; but from the results, yes.

Question. What do you mean—from the results—tell what you mean.

Answer. I mean from the figures obtained from the books.

By Mr. Hinman:

Question. What were the total net profits from the business conducted in that Weeds store in 1919?

Objected to as incompetent, improper.

The Court: Before I admit that I will ask——

Question. Are you able to tell what those profits were—yes or no?

Answer. Yes, sir.

Question. Will you tell us how you are able to state—tell us how you are able to state?

Answer. From the result of records kept by the bookkeeper.

Question. Is that your only information?

Answer. That is the only information I have and all I am able to get.

237 Mr. Cregg: I object to it as not within the knowledge of this witness and not the best evidence.

By the Court:

Question. These books are still in existence, aren't they?

Answer. Yes, sir.

The Court: Why don't you produce the books, Senator?

Mr. Hinman: Your Honor please, I did not suppose the books were necessary. I assumed he would be able, as treasurer of this concern and as the man in charge of handling, to testify as to what he knows about the business—I assumed so.

The Court: If he showed a personal knowledge of it, but he doesn't.

Mr. Hinman: The Government inspectors were there and were told they could see anything and everything they wanted.

The Court: That is not the test. That has nothing to do with it.

Mr. Cregg: The question is, what is the jury going to say in this case? What evidence is going to be produced before them?

The Court: I am obliged to sustain the objection, Senator, and I dislike very much to do it.

Mr. Hinman: Your Honor will do what you think you are obliged to under the law. There is no question about that.

Exception to defendants.

By Mr. Hinman:

Question. During 1919, did you handle the moneys there, and did you know what the divisions of the profits were at the
238 end of the year, personally, and outside of the bookkeeping part of it?

Answer. I knew results, yes, sir.

Mr. Hinman: I don't know as that shows it, but I now repeat the question to him—

Question. Do you know what the total net profits in 1919 were?

Objected to as incompetent, irrelevant, immaterial.

The Court: I feel constrained to sustain the objection.

Exception to defendants.

Paper marked for identification Ex. 113.

By Mr. Hinman:

Question. (Paper shown witness.) I show you a paper and ask you if that has been prepared at my suggestion by the bookkeeping department, giving the total items of expense for 1919?

Answer. These items have been prepared by Mr. J. B. Hein, who has had charge of our bookkeeping since the death of Miss Washburn, who was for many years our bookkeeper.

By the Court: Where is he?

Answer. He is here in Court.

By Mr. Hinman: Using that, can you give to the Court the items that went in to make up that total expense?

Answer. Yes, sir.

Mr. Cregg: I object to the witness using that. The books from which that was taken are now in the possession of the defendant.

Question. Are they not?

Answer. In Binghamton, yes, sir.

239 Question. In defendant's possession?

Answer. Yes, sir.

Mr. Cregg: Is that right?

Mr. Hinman: Yes, he has so testified already and that is the fact.

The Court: Do you object to it?

Mr. Cregg: I do; I think we should have the books.

Objection sustained. Exception."

(At the time when these rulings were made and this evidence excluded by the district court, the proof in the case showed that the defendants' bookkeeper, who had been with them for years, was dead and that she died about two months before the trial. The

trial was had in the City of Syracuse, eighty miles from Binghamton, where defendants reside and have their place of business.)

Twelfth. The district court erred in refusing to permit the defendant Smith to testify to his good faith in marking the goods and merchandise mentioned and described in the first count of the indictment, or directing such markings to be made, and for which the defendants were indicted. The substance of the evidence so rejected by the district court is as follows:

"Question. Did you believe at that time when you gave those directions and marked up price or the marked selling price, as fixed by you on that lot, was a just, fair and reasonable price to charge and ask for that suit under all the conditions as they existed at that time, and merchandise conditions as they existd in Binghamton and in your store?

Answer. Yes, sir.

240 Question. And in doing that—in performing those acts—did you act in entire good faith?

Answer. Yes, sir.

The Court: That is for the jury to say.

Mr. Cregg: I move to have the last answer stricken out.

Motion granted. Exception."

Thirteenth. The district court erred in excluding legal and competent evidence offered by defendants tending to prove and in denying their offer to prove on the trial of this cause, by legal and competent evidence, the actual cost of the various articles of merchandise which went into and made up various "transfer lots" of merchandise, being lots of merchandise made up of various articles costing different prices but brought together in one lot and given and marked at an average cost price. The full substance of that evidence so rejected is as follows:

"The card Ex. 101 refers to and is the card which relates to the sale to A. M. Pierson on January 29, 1920, referred to in Count 7 of the indictment, lot 30535. Suits represented by the cards Ex. 101 and 102 are the suits represented in lot numbers 95825 and 16430, which were put together to make up the transfer lot shown by Ex. 101, lot number 30535.

By Mr. Hinman: I offer to show that the suits that went into this transfer lot 30535 mentioned in count 7 of the indictment were made up in part from suits from a former lot marked 16430, and which cost the Weed concern $13.26 instead of $11.78 as the average cost.

241 The Court: ——

Question. Did you make the calculations as to this cost?

Answer. Yes.

Question. You calculated it to be what?

Mr. Cregg: $11.78, as set forth in the indictment.

The Court: This is the average?

Mr. Hinman: Yes.
Mr. Cregg: I object to it.
The Court: Objection sustained. Exception.

Question. Do you know whether or not this suit that is in question, sold to A. N. Pierson, was a suit bought from Samuel Rosenthal?

Mr. Cregg: I object to it unless she knows personally.
The Court: Sustained. Exception."

Fourteenth. The district court erred in refusing to permit the defendants to prove and in excluding on the trial of this cause, legal and competent evidence tending to prove the good reputation and standing of the defendant Weeds, Inc. The full substance of the evidence so rejected by the district court on that question is as follows:

Harry C. Walker, former Mayor of the City of Binghamton, where the defendants reside and conduct their business, after testifying that he was a former Mayor of that city and at the present time Lieutenant Governor of the State of New York, was asked the following questions and made the following answers:

242 "Question. Do you know the corporation known as Weeds, Inc.?
Answer. I know there is such a corporation.
Question. Doing business in your city?
Answer. Yes, sir.
Question. Do you know the general reputation of that corporation from the speech of people?"

Whereupon, Mr. Cregg, the U. S. Assistant District Attorney, said "I object to that." The district court sustained such objection, and the defendants duly excepted to such ruling.

Fifteenth. The district court erred in excluding evidence tending to show and in refusing to permit defendants to show by cross-examination of the Government's inspectors who made the investigation of the defendants' store and who had testified on direct examination concerning such investigation that there were several other clothing and gents' furnishings stores in the City of Binghamton, where the defendants' business was located, that no examination or investigation of such stores or their methods was made or attempted to be made. James P. Dolan, Government inspector, was the witness being examined and by whom such facts were sought to be elicited by defendant. The following is the full substance of the testimony on cross-examination of Mr. Dolan so excluded by the district court:

"Question. Did you examine any other clothing store in Binghamton on that occasion or on any other occasions?

Objected to as immaterial. Objection sustained. Exception.

Question. Did you ascertain on that occasion that there were many other clothing stores in Binghamton?

Objected to. Objection sustained. Exception."

243 Sixteenth. The district court erred in charging the jury, in substance,

(1) that the first count of the indictment charges that between the 1st day of November, 1919 and the first day of April, 1920 the defendants did conspire in exacting excessive prices for certain necessaries, to wit: wearing apparel;

(2) that the Government's contention here is that Weed and Smith conspired and that after the incorporation of Weeds, Inc., it joined the conspiracy;

(3) that they might find the conspiracy was complete if having made the agreement, any one act was perpetrated or done by any one of the parties in furtherance of the object of the conspiracy;

(4) that the Government's contention is that Weed and Smith conspired and that after the organization of Weeds, Inc. it joined the conspiracy;

(5) that for the want of confirmation by the Senate of the United States of the Peace Treaty brought back by our President from over seas, the United States of America are today at war with the Imperial German Government;

(6) that the law makes wearing apparel a "necessary" and condemns unlawfully making an unjust and unreasonable rate or charge for wearing apparel;

(7) that it was for the jury to say what was an unreasonable or unjust rate or charge.

(8) that the rule of conduct applicable in negligence cases was applicable to determination of the question as to what was a fair and reasonable rate or charge in this case;

(9) that one of the elements to be considered by the jury in determining the question of what was a reasonable rate or charge was the amount paid for the stock offered for sale;

244 (10) that the defendant kept books but that they were not produced on the trial;

(11) that it was for the jury to say whether an average profit of 70% on certain articles specified in the charge was an unreasonable rate or charge, or that the taking or making of such profits constituted a crime or criminal offence;

(12) that there was nothing in the case in exactness or accuracy showing exactly what defendants' books show or what in fact they did as a business or what profits they made;

(13) that the second count of the indictment charges a direct violation of the Act itself in that a suit which cost the defendants $20 was sold to one Nelson for $40;

(14) that Congress had the inherent power to pass this law and that the Act is Constitutional as a matter of law;

(15) that there is no evidence here from anyone engaged in this line of business who would tell us what would be a fair and reasonable marginal profit for doing this class or kind of business;

(16) that the articles of merchandise mentioned, referred to and described in the first Count of the indictment are necessaries.

Seventeenth. The summing up to the jury of the Assistant United States District Attorney was inflammatory and flagrantly unfair and unjust, and was an appeal to the passions and prejudices of the jury and an unfair presentation of the evidence in the case to such a degree as to constitute reversible error.

Eighteenth. The defendants did not have a fair and impartial trial.

HINMAN, HOWARD & KATTELL,
Attorneys for Plaintiffs in Error, Security Mutual Life Building, Binghamton, New York.

Read on Application for Writ of Error, Aug. 3, 1920.
GEO. W. RAY,
U. S. Judge.

Endorsed: Assignment of Errors. Filed Aug. 6, 1920. C. W. Higgison, Clerk.

245 United States District Court, Northern District of New York.

UNITED STATES OF AMERICA

vs.

WEEDS, INC., and GURDON H. SMITH.

The attorneys for the above named defendants having been unable to fully prepare and complete the Bill of Exceptions herein,

It is hereby stipulated that said defendants have to and including September 15th, 1920, in which to prepare, serve and file their proposed bill of exceptions herein, and that an order to that effect may be made without further notice.

Dated August 21, 1920.

FRANK J. CREGG,
Spec. Ass't to Att'y Gen., Attorney for Plaintiff.
HINMAN, HOWARD & KATTELL,
Attorneys for Defendant.

246 United States District Court, Northern District of New York.

UNITED STATES OF AMERICA

vs.

WEEDS, INC., and GURDON H. SMITH.

Upon the annexed stipulation, signed by the attorneys for the respective parties in the above entitled action, and it appearing that the defendants have not been able to make and complete their proposed bill of exceptions, and on motion of Hinman, Howard & Kattell, attorneys for defendants, it is

Ordered that said defendants, Weeds, Inc. and Gurdon H. Smith, have to and including September 15, 1920, in which to make, serve and file their proposed bill of exceptions herein, and said term of Court is continued until September 15, 1920, for that purpose.

Enter

MANTON,
United States Circuit Judge
(Sitting in Above Case).

Endorsed: Stipulation & Order extending time in which to prepare Bill of Exceptions, continuing term, etc. Filed Sep. 2, 1920. C. W. Higgison, Clerk.

247 UNITED STATES OF AMERICA, *ss:*

To the United States of America and to Honorable Dennis B. Lucey, United States District Attorney for the Northern District of New York, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States to be held at Washington in the District of Columbia within thirty days from the date hereof pursuant to a writ of error filed in the Clerk's Office of the District Court of the United States for the Northern District of New York, wherein Weeds, Inc. and Gurdon H. Smith are plaintiffs in error, and the United States of America is defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiffs in error as in the said writ of error mentioned should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable George W. Ray, United States District Judge for the Northern District of New York, this — day of August in the year one thousand nine hundred and twenty.

August 3, 1920.

GEO. W. RAY,
United States District Judge.

Personal service of the foregoing Citation and of a copy of the Assignment of Errors, Prayer for Reversal and Writ of Error herein is hereby admitted, this 9th day of Aug. 1920.

D. B. LUCEY,
U. S. District Attorney.

248 [Endorsed:] U. S. District Court, Northern District of New York. Cy. 2013. Weeds, Inc., and Gurdon H. Smith, Plaintiffs in error, vs. United States of America, Defendant in error Citation. Hinman, Howard & Kattell, Attorneys for plaintiffs in error, Security Mutual Life Bldg., Binghamton, N. Y. Hinman, Howard & Kattell, Binghamton, N. Y. D. C. U. S. District Court, N. D. N. Y. Filed Sep. 15, 1920, at — o'clock. C. W. Higgison, Clerk.

249 UNITED STATES OF AMERICA,
Northern District of New York,
District Court Clerk's Office, ss:

I, Charles W. Higgison, Clerk of the District Court of the United States for the Northern District of New York do hereby make return to the foregoing Writ of Error to the Supreme Court of the United States and do hereby certify that the foregoing pages numbered from one to two hundred forty-six inclusive, contain a true and correct transcript of the record and proceedings had in said Court in the case of United States of America vs. Weeds, Inc. and Gurdon H. Smith as the same remain of record and on file in the office of the Clerk of said Court.

In testimony whereof, I have hereunto set my hand at the City of Utica in the said Northern District of New York, this 15th day of September, in the year of our Lord, one thousand nine hundred and twenty and of the Independence of the United States, the One Hundred and Forty-Fifth.

[Seal of United States District Court, N. Dist. New York.]

CHAS. W. HIGGISON,
Clerk.

Endorsed on cover: File No. 27,915. N. New York D. C., U. S. Term No. 558. Weeds, Inc., and Gurdon H. Smith, plaintiffs in error, vs. The United States of America. Filed September 22, 1920. File No. 27,915.

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JAMES D. MAHE
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1920.

No. 558.

WEED'S INC. and GURDON H. SMITH,
Plaintiffs-in-Error,

against

UNITED STATES OF AMERICA,
Defendant-in-Error.

In Error to the United States District Court for the Northern District of New York.

Brief and Argument for Plaintiffs-in-Error.

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IN THE

Supreme Court of the United States,

OCTOBER TERM, 1920.
No. 558.

WEED'S INC. and GURDON H. SMITH,
Plaintiffs-in-error,

against

UNITED STATES OF AMERICA,
Defendant-in-error.

IN ERROR TO THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF NEW YORK.

BRIEF AND ARGUMENT FOR PLAINTIFFS-IN-ERROR.

Statement of the Case.

This is a writ of error to review a judgment of the District Court of the United States for the Northern District of New York, convicting the plaintiffs-in-error, upon indictment, of a violation of the Act of October 22, 1919, c. 80 (41 Stat. 297), amending Section 4 of the Act of August 10, 1917, c. 53 (40 Stat. 276), commonly called the Lever Act.

The Statute.

Sections one and four of the original Act of August 10, 1917, were as follows:

> "That by reason of the existence of a state of war, it is essential to the national security and defense, for the successful prosecution of the war, and for the support and maintenance of the Army and Navy to assure an adequate supply and equitable distribution, and to facilitate the movement, of foods, feeds, fuel including fuel oil and natural gas, and fertilizer and fertilizer ingredients, tools, utensils, implements, machinery, and equipment required for the actual production of foods, feeds, and fuel, hereafter in this Act called necessaries; to prevent, locally or generally, scarcity, monopolization, hoarding, injurious speculation, manipulations, and private controls, affecting such supply, distribution, and movement; and to establish and maintain governmental control of such necessaries during the war. For such purposes the instrumentalities, means, methods, powers, authorities, duties, obligations, and prohibitions hereinafter set forth are created, established, conferred, and prescribed. The President is authorized to make such regulations and to issue such orders as are essential effectively to carry out the provisions of this Act.
>
> * * * * * *
>
> "Sec. 4. That it is hereby made unlawful for any person willfully to destroy any necessaries for the purpose of enhancing the price or restricting the supply thereof; knowingly to commit waste or willfully to permit preventable deterioration of any necessaries in or in connection with their production, manufacture, or distribution; to hoard, as defined in section six of this Act, any necessaries; to monopolize or attempt to monopolize, either locally or generally, any necessaries; to en-

gage in any discriminatory and unfair, or any deceptive or wasteful practice or device, or to make any unjust or unreasonable rate or charge, in handling or dealing in or with any necessaries; to conspire, combine, agree, or arrange with any other person, (a) to limit the facilities for transporting, producing, harvesting, manufacturing, supplying, storing, or dealing in any necessaries; (b) to restrict the supply of any necessaries; (c) to restrict distribution of any necessaries; (d) to prevent, limit, or lessen the manufacture or production of any necessaries in order to enhance the price thereof, or (e) to exact excessive prices for any necessaries; or to aid or abet the doing of any act made unlawful by this section."

The Act of October 22, 1919, amended section one of the original Act by inserting the words "wearing apparel, containers primarily designed or intended for containing foods, feeds, or fertilizers," so that section one of the Act was amended to read as follows (the amendment being italicized):

"That by reason of the existence of a state of war, it is essential to the national security and defense, for the successful prosecution of the war, and for the support and maintenance of the Army and Navy, to assure an adequate supply and equitable distribution, and to facilitate the movement of foods, feeds, *wearing apparel, containers primarily designed or intended for containing foods, feeds, or fertilizers;* fuel, including fuel oil and natural gas, and fertilizer and fertilizer ingredients, tools, utensils, implements, machinery, and equipment required for the actual production of foods, feeds, and fuel, hereafter in this Act called necessaries; to prevent, locally or generally, scarcity, monopolization, hoarding, injurious speculation, manipulation, and priv-

ate controls, affecting such supply, distribution, and movement; and to establish and maintain governmental control of such necessaries during the war. For such purposes the instrumentalities, means, methods, powers, authorities, duties, obligations, and prohibitions hereinafter set forth are created, established, conferred, and prescribed. The President is authorized to make such regulations and to issue such orders as are essential effectively to carry out the provisions of this Act."

The original section four did not provide a penalty for its violation. The amendment of October 22, 1919 (41 Stat. 297), provided a penalty and amended section four so as to make it inapplicable to certain favored classes. The amended section four is as follows (the amendment being italicized):

"That it is hereby made unlawful for any person willfully to destroy any necessaries for the purpose of enhancing the price or restricting the supply thereof; knowingly to commit waste or willfully to permit preventable deterioration of any necessaries in or in connection with their production, manufacture, or distribution; to hoard, as defined in section 6 of this Act, any necessaries; to monopolize or attempt to monopolize, either locally or generally, any necessaries; to engage in any discriminatory and unfair, or any deceptive or wasteful practice or device, or to make any unjust or unreasonable rate or charge in handling or dealing in or with any necessaries; to conspire, combine, agree, or arrange with any other person, (a) to limit the facilities for transporting, producing, harvesting, manufacturing, supplying, storing, or dealing in any necessaries; (b) to restrict the supply of any necessaries; (c) to restrict distribution of any necessaries; (d) to prevent,

limit, or lessen the manufacture or production of any necessaries in order to enhance the price thereof; or (e) to exact excessive prices for any necessaries, or to aid or abet the doing of any act made unlawful by this section. *Any person violating any of the provisions of this section upon conviction thereof shall be fined not exceeding $5,000 or be imprisoned for not more than two years, or both: Provided, That this section shall not apply to any farmer, gardener, horticulturist, vineyardist, planter, ranchman, dairyman, stockman, or other agriculturist, with respect to the farm products produced or raised upon land owned, leased, or cultivated by him: Provided further, That nothing in this Act shall be construed to forbid or make unlawful collective bargaining by any cooperative association or other association of farmers, dairymen, gardeners, or other producers of farm products with respect to the farm products produced or raised by its members upon land owned, leased, or cultivated by them.*"

The Indictment.

The defendants were Weed's, Inc. (a corporation which was organized on January 1, 1920, and has since conducted a leading retail clothing or furnishing store in the City of Binghamton, New York), Charles A. Weed and Gurdon H. Smith, respectively the President, and the Treasurer and Manager, of the corporation. Mr. Weed was not tried (Transcript, pp. 10, 25). The other defendants were tried and convicted (*id.* pp. 10-11, 127).

The indictment contained eight counts. Count Six was dismissed by the District Court (*id.* p. 123).

The first count of the Indictment was for conspiracy "to exact and to aid and abet in exacting

excessive prices for certain necessaries, to wit, wearing apparel." It was alleged that on or about November 1, 1919, (which was before the corporation was organized), the defendant entered into the conspiracy and that between November 1, 1919, and April 1, 1920, and in furtherance of said conspiracy, the defendants caused to be placed upon sale in their store in Binghamton articles of clothing "at prices and figures greatly in advance of the actual cost price thereof." Then followed an enumeration of classes of clothing with the cost and prices as "marked for sale" (*id.* pp. 3-4).

The remaining counts of the indictment, counts Two to Eight inclusive (that is, except the dismissed count Six), charged that prior to January 8, 1920, the defendants "purchased and caused to be purchased certain necessaries," to wit, certain clothing described, and that thereafter (on various dates set forth which fell between January 8, 1920, and March 3, 1920) at their store in Binghamton the defendants unlawfully and wilfully did "cause to be made and aid and abet in making an unjust and unreasonable rate and charge in handling and dealing in and with certain necessaries," to wit, the described clothing. Then followed, in each count, a statement of the price at which the respective sales were made, the difference between said stated price and the alleged cost, and it was alleged that thereby the defendants made an "unjust and unreasonable rate and charge" in "handling and dealing in and with" said clothing (*id.* pp. 4-10). In fact, the evidence was undisputed that most of the articles in question had been purchased long prior to October, 1919.

The first count of the indictment thus rested upon the provision of Section 4 of the Lever Act as amended, providing

> "that it is hereby made unlawful for any person * * * to conspire, combine, agree or arrange with any other person * * * (e) to exact excessive prices for any necessaries."

The other counts rest upon the provision of Section 4 of the Lever Act as amended, making it unlawful

> "to make any unjust or unreasonable rate or charge in handling or dealing in or with any necessaries."

See charge of District Court (*id.* pp. 120-124).

Demurrer to Indictment.

The defendants demurred to the indictment, and to each count, challenging the constitutional validity of these provisions of the Lever Act and the sufficiency of the indictment.

Among other grounds of demurrer it was set forth that if the acts alleged were contrary to the statute or to any executive regulation thereunder then the statute and such regulation were in violation of the provision of Article V of the Amendments to the Constitution of the United States, in that they deprived the defendants of their liberty and property without due process of law; also, that the statute upon which the counts were based was null and void because not authorized by the Constitution at the times mentioned in the indictment by reason of any state of war; also, that the statute on which the counts of the indictment were based was null and void because it was so uncer-

tain and indefinite in its terms that it did not properly define a criminal offense and was in violation of the provisions of Articles V and VI of the Amendments to the Constitution of the United States.

The Court overruled the demurrer with respect to the entire indictment and with respect to each count thereof and the plaintiffs-in-error duly excepted (*id.* pp. 12-23, 24).

Motion to Dismiss or Quash.

The defendants also raised their constitutional points, and their objections to the sufficiency of the indictment by motions to quash or to dismiss the indictment, in its entirety, and each count, and these motions were overruled by the District Court (*id.* pp. 24-25, 32).

The constitutional questions, as well as the questions relating to the sufficiency of the indictment, were also raised by motions to dismiss at the close of the case and by motion in arrest of judgment (*id.* pp. 94-98, 127).

The District Court denied all these motions and exceptions were duly taken.

Objections to Evidence.

There were serious errors, as the plaintiffs-in-error contend, in rulings upon question of evidence.

The Court in these rulings not only construed the statute, but construed it in a manner which, it is submitted, made the statute as thus applied clearly unconstitutional.

Thus the Court refused to permit evidence by witnesses, concededly competent, of the fair

market value of the articles of clothing in question, both at the time when the statute was passed (October 22, 1919), so far as it affected such articles, and at the times respectively when these articles were marked for sale and actually sold.

The theory of the District Court, upon which, over the objections of the plaintiffs-in-error, the case was tried and submitted to the jury, was that a jury could take the purchase price at which the articles of clothing had been purchased by the plaintiffs-in-error and the price at which these particular articles were sold by the plaintiffs-in-error, and without any proof that the sale prices were above the market value at the time of sale, and without proof that the profits either from the entire business of the store or from the business of any department of the store exceeded a fair return upon the investment in the business at the store, the plaintiffs-in-error could be convicted of a violation of the Act if the jury thought that the price at which the articles were sold respectively, as compared with their cost, gave as to these particular articles an excessive profit.

It appeared from the evidence that a number of the articles described in the indictment had been bought a year, or two years, or more, prior to the enactment of the amended statute, and no regard whatever was paid by the District Court either to the general rise in prices subsequent to the purchase of these articles, or to the increase in the market values of the articles themselves, or to the cost of the replacement of these articles or to the depreciation in money which had occurred in correspondence to the general rise in prices. The District Court not only adhered to its theory in its rulings upon evidence but in its instructions to the jury (*id.* pp. 122-124).

Verdict and Sentence.

The jury returned a verdict against Weed's, Inc., the corporation, and Gurdon H. Smith, and the Court then sentenced these defendants to pay a fine of $1,000 on the First count and of $5,000 on each of the Second, Third, Fourth, Fifth, Seventh and Eighth counts, making a total fine of $31,000 (*id.* p. 127).

From the judgment of conviction a writ of error has been sued out.

Specifications of Error (id. pp. 145-160).

Error has been assigned by reason of

(1) The overruling of the demurrer;

(2) The denial of the motion to quash or dismiss the indictment;

(3) The denial of the motion to dismiss which was made at the close of the case;

(4) The refusal to permit competent proof of the market value of the goods in question;

(5) Other errors in rulings upon questions of evidence;

(6) The erroneous theory upon which the case was submitted to the jury.

There were several rulings of the Court with respect to the question of market value. It is sufficient to refer to the following extracts from the assignment of errors (Transcript, pp. 149, 149-150, 151, 152-153).

> "Counsel for the defendants then stated, 'I offer to show by this witness the market value on October 22, 1919, of the articles of merchandise mentioned and described in subdivisions 22, 25 and 26 of Count One, and in

Counts Three, Four and Eight of the indictment.' The District Attorney thereupon objected to such evidence, and the Court said: 'The market value of the particular item of articles, wearing apparel, on October 22, 1919, I will rule that this witness is competent to testify. I shall rule that it is not competent testimony relative to the issue. Objection sustained.'

"Thereupon, defendants duly took exception to such ruling of the Court. Defendants' counsel then stated: 'I offer to prove by this witness the same facts with reference to the various dates on which those items mentioned in the subdivisions and Counts before mentioned appear to have been sold, by the indictment.' Whereupon, the Court said, 'The same ruling,' to which the defendants duly excepted.

"Counsel for the defendant then offered evidence of the same facts as to the remaining Counts of the indictment, which evidence was likewise excluded by the Court and to which exception was duly taken." (See Bill of Exceptions, *id.*, p. 61.)

* * * * * * *

"Counsel for the defendants then stated to the Court that the position of the defendants was, and the evidence was offered on the theory, that inasmuch as the articles involved and for the sale of which the defendants had been indicted were purchased long before October 22, 1919, when the amendment to the Lever Act took effect, Congress was without power to deprive the defendants of the right to sell such articles at a fair and reasonable advance over the market value of such articles on October 22, 1919; that defendants were not limited to proof of the cost of the goods to them two or three years before the amendment to the Act took effect, but were entitled to show the market value of such articles on October 22, 1919, when the amendment of the Act took effect; and that other-

wise the defendants would be deprived of their property and liberty to contract without due process of law. The court thereupon excluded such testimony, to which the defendants duly excepted.

"Thereupon, counsel for defendants stated to the Court,

> " 'One step further. It brings up the question in another form. I offer to show by this witness, if your Honor please, the value, the market value of this same lot of goods in March, 1920, that is, the date when they' (the Government inspectors) 'visited the store. That is on the same theory and raises another question. That I want to raise now by this offer, and that is, what the market value was of this merchandise at the time if (the merchandise) was marked and put on sale. It is offered on the same ground.'

"To which the District Attorney objected, which objection was sustained, and to which the defendants duly excepted. Thereupon, defendants' counsel stated to the Court:

> " 'Let me also call your Honor's attention to the fact, and I put it on the ground, that a fair construction of the Act itself does not show any intent or purpose on the part of Congress to legislate with reference to existing values or prices or charges. In other words, there is nothing there indicating that they intended that this amendment should operate or this statute should operate in the nature of an *ex post facto* law.'

"To which the Court replied, 'Congress intended to make an infraction of the statute which it passed, the conduct of the seller, the price he charged subsequent to the passage of, the effective date of the law.' To which counsel for the defendants replied, 'Your

Honor will note an exception' (See Bill of Exceptions, *id.*, pp. 45-46).

* * * * * * *

"Defendants' counsel then stated, 'I think it is covered, but I want the last witness * * * I offer to show by Mr. Munves the replacement value to Weeds on October 22, 1919, of this particular lot.' The Court replied, 'You did that by attempting to show the then market value.' In answer to this, defendants' counsel said, 'On those two dates, on October 22, 1919, and in March, 1920,' to which the court replied, 'Yes.'

"Defendants' counsel then made the following offer: 'I offer to show by Mr. Munves that Weeds, Inc., the defendants, on October 22, 1919, would have had to pay the prices at which those goods were marked and sold at that time; in October 22, 1919, if they had bought them in the market they would have had to pay that price.' To this the District Attorney objected, and the court said: 'I will exclude that,' to which defendants duly excepted. Whereupon, the defendants' counsel made the same offer as to March, 1920, to which offer the court made the same ruling and to which exception was duly taken by defendants.

"Again, defendants offered to prove by legal, competent evidence the market value and replacement cost to the defendants on February 11, 1920, the date when some of the items covered by the first count of the indictment were given their 'marked for sale price', which was objected to by the District Attorney 'as immaterial,' which objection was sustained by the court and to which the defendants duly excepted (See Bill of Exceptions, *id.* pp. 48, 63).

* * * * * * *

"By Mr. Hinman:

"Question. What was the market value—wholesale value—of that suit and the suits in that lot on November 20, 1919, when you gave

the marked selling price at $60; that is, what would it have cost you to replace that suit on that day?

"Objected to. Objection sustained. Exception.'

"Thereupon, defendants' counsel made the following offer: 'I offer to show by the witness that the market, the replacement value of the men's suits covered by the 24th item of the first Count of the indictment on December 11, 1919, at the time when Mr. Smith caused the selling price to be marked $75—to be placed on the lot, was $50.' Objection was made and sustained, to which exception was taken. Thereupon, defendants' counsel also offered to prove that the wholesale market value and replacement value of the lot of overcoats described in the 25th item of the first count of the indictment on August 6, 1919—the time when Mr. Smith caused the marked selling price of $50 to be placed on that lot, was $40,—to which objection was made, sustained, and exception to such ruling duly taken. Thereupon, the following occurred:

"Mr. Hinman.—I offer to prove—no question is raised as to his competency?

"Mr. Cregg.—Why don't you simply say you make that same offer as to each count?

"Mr. Hinman.—It is different values.

"The Court.—You have made it as to one. I think that is sufficient, anyway.

"Mr. Hinman.—I think that is so. Now, if your Honor please, let me make the same offer with reference to Counts Two, and I do make the same offer with reference to Counts Two, Three, Four, Five, Seven, and Eight of the indictment where actual sales were made. Same objection. Objection sustained. Exception.

"Mr. Hinman.—Now, if your Honor please, I offer to show that the replacement or wholesale market value of the suits or articles de-

scribed in and covered by Counts Two, Three, Four, Five, Seven and Eight of the indictment, on the dates when those respective articles were sold, as stated in those Counts, was greatly in excess of the cost price—actual cost of those articles, respectively, as stated in those Counts. Same objection. Objection sustained. Exception" (*id.*, pp. 87-88).

ARGUMENT.

The fundamental questions relating to the constitutional validity of the statute and its construction have been so fully presented in the brief for the appellees in the case of *Harry B. Tedrow, as United States District Attorney, appellant,* v. *The A. T. Lewis & Son Drygoods Company, et al.*, on appeal from the District Court of the United States for the District of Colorado (No. 357 of this Term), that it is unnecessary to review again in this case the entire field of the argument. Rather it will be our purpose to present as succinctly as possible and without unnecessary repetition of detail the fundamental considerations involved.

We present the following points:

(1) The Court has jurisdiction of this writ of error.

(2) The statute at the time of its enactment and enforcement, was not a valid exercise of the war power. It was not competent for Congress on October 22, 1919, (when the amended statute was enacted), or at the times when the sales in question were effected, to regulate prices of retail sales of wearing apparel in wholly intrastate transactions.

(3) It was not competent for Congress on October 22, 1919, (when the amended statute was enacted), or at the times mentioned in the indictment, to deprive plaintiffs in error of the then fair market value of their property by denying them the right to contract for the sale of such property at its fair market value. If the statute in question be construed as the District Court construed it, it is invalid as a deprivation of property without due process of law in contravention of the Fifth Amendment.

(4) The Court below construed the statute erroneously.

(5) The statute, as construed by the Court below, does not validly define a criminal offense and by reason of its uncertainty is invalid under the Fifth and Sixth Amendments.

(6) The statute in question is arbitrary class legislation in violation of the Federal Constitution.

(7) The Court below erred in its rulings upon questions of evidence.

(8) The Court below erred in its submission of the case to the jury.

POINTS.

FIRST.—The Court has jurisdiction of this writ of error.

The constitutional validity of the provisions of the statute, upon which the indictment rests, is involved, and hence it is a case for direct writ of error (Judicial Code, Sec. 238).

The fact that the construction of the statute is involved, as well as its constitutional validity, does not affect the jurisdiction.

Towne v. *Eisner*, 245 U. S. 418;
Billings v. *United States*, 232 U. S. 261, 276;
Altman & Co. v. *United States*, 224 U. S. 583, 596, 597.

SECOND.—The statute at the time of its enactment and enforcement, was not a valid exercise of the war power. It was not competent for Congress on October 22, 1919, (when the amended statute was enacted), or at the times when the sales in question were effected, to regulate the prices of retail sales of wearing apparel in wholly intrastate transactions.

Interstate commerce is not involved. The transactions in question were the ordinary retail sales of a dry-goods merchant to purchasers within his own town. Still, the Act of Congress has been applied and the plaintiffs in error have been convicted and fined.

In its brief in *United States* v. *L. Cohen Grocery Company* (No. 324 of this Term, Gov't. Brief, p. 12), the Government says:

> "It is readily conceded that ordinarily legislation of this kind is not within the power of Congress to enact."

The question then is, whether this legislation, regulating intrastate retail prices of wearing apparel, can be sustained as a valid exercise of the constitutional power of Congress to provide for the conduct of a war.

Preliminarily, we assume that the following propositions are beyond controversy:

(1) The war power is found in the express authority

> "To declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water. * * *" (Article I. Sec. 8. subd. 11.)
>
> "To raise and support Armies * * *" (*id.*, subd. 12).
>
> "To provide and maintain a Navy" (*id.*, subd. 13).
>
> "To make Rules for the Government and Regulation of the land and naval Forces" (*id.*, subd. 14).
>
> "To provide for calling forth the Militia to execute the Laws of the Union, to suppress Insurrections and repel Invasions" (*id.*, subd. 15).

The power to enact the legislation in question, if it exists, must fall within the implied power conferred by Article I, Sec. 8, subd. 18,

> "To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Govern-

ment of the United States, or in any Department or Officer thereof".

(2) The power implied in the authority to provide for the conduct of war is a broad power of vast importance to the security of the Nation, *but it is not an unlimited power.*

Ex parte Milligan, 4 Wall. 2;
Hamilton v. *Kentucky Distilleries & Warehouse Co.*, 251 U. S. 146, 156;
Ruppert v. *Caffey*, 251 U. S. 264, 282, 308.

It necessarily follows that, if the power be not an unlimited one, Congress cannot pass any Act it pleases. The judicial duty still remains to enforce the fundamental law.

(3) As the power, which is asserted, is an implied power, the statute has constitutional validity only if it is a law "*necessary and proper*" for carrying into execution the power of Congress to provide for the conduct of a war. The limitations of the implied power thus inhere in its constitutional definition. To say that Congress merely because we are at war can pass any Act it pleases, without regard to the exigency, is to ignore the only ground upon which Congress may legislate. The question necessarily is whether the statute has that *direct relation* to the conduct of the war that it may be said to be an act of legislation necessary and proper for that purpose. This is a judicial question.

(4) To constitute a valid exercise of power, the statute must be found to be within the constitu-

tional authority of Congress not only at the time of its enactment but *at the time that it is enforced.*

Hamilton v. *Kentucky Distilleries Co.*, 251 U. S. 146, 162, 163.
Minnesota Rate Cases, 230 U. S. 352, 473.
Missouri Rate Cases, 230 U. S. 474, 508.
Perrin v. *United States*, 232 U. S. 478, 486.
Johnson v. *Gearlds*, 234 U. S. 422, 446.
Lincoln Gas Company v. *Lincoln*, 250 U. S. 256, 268.

It is plain that a war may present a great variety of exigencies. There might be a war with Haiti, which would involve only a few naval forces and present no basis whatever for legislation regulating the internal concerns of the American people. There are small wars as well as big wars, and if the mere existence of war, even actual warfare, justified any legislation Congress might please to enact, however it might override constitutional principles otherwise applicable, then our system of government may at any time be entirely subverted by some petty conflict. All State laws could be displaced, upon an utterly unwarranted assumption of necessity, in a situation which, presenting no serious exigency whatever from a military standpoint, would still be war in law and thus call into play the war power of the Nation.

We fully appreciate the broad discretion confided to Congress in the exercise of its essential authority for the protection of the life of the Nation. Courts will not substitute their judgment for that of Congress in matters of war policy. But, giving to the war power its broadest possible content, it cannot be used to destroy the Constitu-

tion itself by a disruption of all State power over matters concededly reserved to the States, where it is apparent that the action of Congress is not addressed to the conduct of war. For example, if we had a war with Haiti, it is not conceivable that this would give to Congress authority to regulate the price of retail sales of clothing from Maine to California.

Not only may there be small wars, as well as big wars, but it is manifest that the exigencies of big wars may terminate before a formal treaty of peace has been ratified. It may happen that the military aim has been completely achieved and that while there has been no treaty of peace the enemy has grounded its arms and lies at the mercy of the victorious nation. We should suppose that the contention would be at once dismissed as utterly untenable that in such a situation the mere fact of a state of legal war would justify the exercise by Congress of a war power in the manner in which it could be exercised during the actual continuance of hostilities. The Constitution is our chart, and the sole authority it confers in such a case as this is to pass laws "necessary and proper for carrying into execution the foregoing powers," that is, to conduct a war. In any given situation, the validity of the legislation must depend upon its relation to the conduct of the war. Is it not plain that there may come a time when action by Congress, although there is a legal state of war, has no direct relation to the conduct of war? And if this is found to be so, then the assertion of the war power is a mere pretext, and a futility, just as futile as the assertion of power to control intrastate commerce in time of peace.

We therefore conceive it to fall far short of the mark for the Government to insist that we are still in a state of war with the Imperial Government of Germany. The question is not whether we are in a state of war, but whether a statute enacted by Congress has, at the time of the transactions to which it is sought to be applied, any reasonable relation to the conduct of the war.

We may refer, without repetition, to the review of the facts, as to the existing exigency, in the brief for appellees in *Tedrow* v. *Lewis*. This review comprises public acts and matters of common knowledge of which the Court will take judicial notice. The military objects of the war had been achieved long prior to October 22, 1919, when this Act was passed, and certainly prior to February and March, 1920, when several of the transactions for which the plaintiffs-in-error have been convicted and fined, took place. The enemy for more than a year had been powerless to continue the war, its military power had been destroyed, and terms which involved a complete surrender had been imposed as a condition of the armistice; and, while the United States has not made a treaty of peace, the other great powers with which we were associated have made a treaty creating a condition of affairs which removes every possibility of menace from the prostrate foe. Our own army has been demobilized, and activities which had a direct relation to the conduct of the war have been abandoned.

In the brief for appellees in the *Tedrow* case, there is a detailed statement with respect to the discontinuance of various war activities.

The Lever Act itself, which had originally been enacted in August, 1917, was a food control measure. But prior to the amendment of October 22,

1919 (the only provision pertinent here), the Food Administration had gone out of existence. As the Government says in its brief in the *Cohen Grocery* case (p. 6), "Congress deemed it unwise or unnecessary to continue the Food Administration as it had existed during actual hostilities." And again (p. 36), "Under this section" (referring to section 5 of the original Lever Act) "the President organized the Food Administration, and, through it, administered a license system, by which he controlled the prices of necessaries. After the Armistice, however, and when it seemed probable that actual hostilities would not be resumed, Congress evidently felt that it was not longer necessary to appropriate the funds necessary to continue the expensive Food Administration, and the licensing system went out of existence." Thus, we had gone through the severe struggle of the war, when the Nation was summoning all its resources to a stupendous effort, without any provision for the control of prices of "wearing apparel", which were not within the original Lever Act, and after the Food Administration relating to the most vital of necessities had been discontinued, and a year had elapsed since the Armistice, the amendment was enacted bringing "wearing apparel" within the Act and asserting control of intrastate retail sales under the penalty of criminal prosecution.

In *Hamilton v. Kentucky Distilleries Co., supra*, it was assumed that the implied war power of Congress "must depend *not upon the existence of a technical state of war, terminable only with the ratification of a treaty of peace or a proclamation of peace, * * * but upon some actual emergency or necessity arising out of the war or incident to*

it'' (251 U. S. p. 161). That was a case involving the validity of the War-Time Prohibition Act and, in view of the nature of the subject matter the Court sustained the exercise of power, but the *rule of limitation* was distinctly recognized.

In the subsequent case of *Ruppert* v. *Caffey, supra,* the doctrine of the *Kentucky Distilleries* case was applied, and the question was not as to the existence of the rule of limitation, but merely as to its application. The fundamental principle involved, which underlay the earlier decision, was emphatically stated by the dissenting Judges, who had concurred in the decision in the *Kentucky Distilleries* case. Thus, it was said in the dissenting opinion of Mr. Justice McReynolds (*Ruppert* v. *Caffey,* p. 308):

> ''By considering the circumstances existing when the War-Time Prohibition Act was challenged, in order to reach the conclusion announced in *Hamilton* v. *Kentucky Distilleries & Warehouse Co., supra,* this court asserted its right to determine *the relationship between such an enactment and the conduct of war;* the decision there really turned upon an appreciation of the facts. And *that the implied power to enact such a prohibitive statute does not spring from a mere technical state of war but depends upon some existing necessity directly related to actual warfare, was recognized.''*

It is therefore far from sufficient for the Government to insist that we are still in a state of war with the Imperial Government of Germany. The question is not whether we are in a technical state of war, but whether a statute enacted by Congress at the time of the transactions to which it is sought to be applied, has any reasonable relation to the conduct of the war.

The conduct of the war must, of course, be distinguished from the economic consequences of the war. If legislation dealing with all economic consequences of war were justified by the war power, then the war power could be exercised for a generation or perhaps longer. The matter is one of vital importance, for while the entire strength of the Nation, regardless of State lines, must be at command for the success of the National arms, it is impossible to conceive that the States surrendered their power to the Federal Government with respect to their own domestic concerns, in exigencies that had no relation to the success of the National arms. The express power is to declare war, to maintain armies and navies. These powers have reference to military aims, to defense, or, for that matter, to conquest. The objective as shown by the terms of the express power is a military objective. It has been well said that the power to wage war is to wage war successfully, but this means the waging of war upon an enemy, not the waging of war upon the citizens of this country. When the military ends are satisfied, when the enemy is down and cannot get up, when there is no prospect of any danger to our security, when our Army has been absorbed in the varied vocations of civil life, when the whole country is adjusting itself to the conditions of actual peace, we submit that it is entirely beyond any authority conferred by the Constitution for Congress to attempt, on a pretense of war, and merely because of the absence of a treaty, to step into a State and tell its citizens how they shall sell wearing apparel in intrastate trade.

The Government refers to a statement in the opinion in *Stewart* v. *Kahn*, 11 Wall. 493, 507,

where it is said that the war power "carries with it inherently the power to guard against the immediate renewal of the conflict, and to remedy the evils which have arisen from its rise and progress." This statement must, of course, be taken in its relation to the particular subject under consideration. It was manifestly appropriate in connection with the question decided, which arose from an Act of June 11, 1864, enacted in the midst of the Civil War which provided in substance that, wherever judicial proceedings had been interrupted by the war, the period of such interruption or of resistance to the laws should not count as a part of the time limited for the commencement of actions. Such a decision, and the statement quoted from the opinion, cannot be taken to imply an authority in Congress by the exercise of the war-power to pass any Act to "remedy evils," in a broad sense, which may flow from war. Refusal of opportunity to sue after judicial process is again available would amount to virtual destruction of property rights. And, it is not questioned but that war activities must be wound up and that proper time must be allowed for that purpose. To reason, however, from such an exercise of authority to the assertion of a broad power unessential to vindication of rights, unconnected with the winding up of war activities, and unrelated to the success of the national arms, or the conduct of war, in order to establish control of intrastate concerns upon the ground that intrastate business reflected an economic condition which was the result of the withdrawal from production of men and materials in the course of military effort, would constitute a plain *non sequitur*. For, if this reasoning were ac-

cepted and it were regarded as a permissible exercise of the war-power to remedy any economic condition which might be regarded as resulting from the limitation of production during the war, Congress might now, and very likely for many years to come, exercise an authority which would entirely subvert the Republic. Joining the conception thus advanced to the notion that the discretion of Congress in the exercise of power must be broadly sustained, there would be no conceivable limit to the exercise of Federal authority for an indefinite time with respect to economic conditions.

Such a theory, it is submitted, cannot be entertained, because it loses sight of *direct relation* to the conduct of war, that must be found as the constitutional warrant for the exercise of war-power. It is this distinction which makes possible the maintenance of constitutional government in this country. For, if the distinction between direct and indirect relation should be overlooked, then most of the important express powers of Congress would at once have a breadth of application which would be destructive of the powers reserved to the States, and hence of our constitutional system itself. If, however, the distinction is maintained between the authority to do that which has direct relation to the conduct of war, then nothing is lost which is essential to national security, while the Constitution automatically operates to maintain unimpaired its distribution of power between Federal and State authority after the military exigency has passed.

We respectfully urge that Congress had no power to undertake the regulation of the prices of wearing apparel in local sales at the times specified in this indictment.

THIRD.—It was not competent for Congress on October 22, 1919, (when the amended statute was enacted), or at the times mentioned in the indictment, to deprive plaintiffs in error of the then fair market value of their property by denying them the right to contract for its sale at such fair market value. If the statute in question be construed as the District Court construed it, it is invalid as a deprivation of property without due process of law in contravention of the Fifth Amendment.

(1) It is not open to controversy that the war power is subject to applicable constitutional limitations.

> *Hamilton* v. *Kentucky Distilleries Company*, 251 U. S. 146, 156.
> *Ex parte Milligan*, 4 Wall. 2, 121-127.

One of these applicable constitutional limitations is the due process clause of the Fifth Amendment. Congress has the amplest power to raise by taxation all the money it needs, but if it takes private property for the conduct of the war it must pay for it. Its obligation not to take private property except for public purposes and only on payment of just compensation continues. Even when property is impressed for the use of the Army, under imperative military exigency, the Government must pay for it.

> *Mitchell* v. *Harmony*, 13 How. 115, 134.
> *United States* v. *Russell*, 13 Wall, 623, 627-629.

The only exception is with respect to property destroyed by military operations in the actual

theatre of war (*United States* v. *Pacific Railroad*, 120 U. S. 227, 239).

There is no military exigency which authorizes the Government to compel a citizen to give his property away. War does not abolish the fundamental guarantees of the Constitution or authorize confiscation. The duty of the citizen to render military service is fixed by the Constitution itself. And, further, the protection of the citizen against arbitrary and tyrranical exaction may be far more important in time of war, when feeling runs high, than in time of peace. After referring to the Fifth and Sixth Amendments, this Court said in the *Milligan case, supra*:

> "The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances. No doctrine, involving more pernicious consequences, was ever invented by the wit of man than that any of its provisions can be suspended during any of the great exigencies of government. Such a doctrine leads directly to anarchy or despotism, but the theory of necessity on which it is based is false; for the government, within the Constitution, has all the powers granted to it, which are necessary to preserve its existence; as has been happily proved by the result of the great effort to throw off its just authority."

(2) It necessarily follows that the *regulation* of the use and disposition of private property in time of war must be consistent with due process of law. That regulation affecting prices or rates may constitute deprivation of liberty and property without due process of law is well established. The principle is applied even in the case of services

pursuant to a public undertaking (*Stone* v. *Farmers Loan & Trust Co.*, 116 U. S. 307; *Smyth* v. *Ames*, 169 U. S. 466; *Minnesota Rate Cases*, 230 U. S. 352).

There can be no controversy as to the construction which the Court below placed upon the statute in question, or of the character of the regulation which was thus held to be established. The statute relates not to a public undertaking, but to a private business. It has been made to extend to lawful business of an ordinary sort, such as that of a retail clothing store. While the statute aims at the regulation of prices, it is even less defensible than a statute which fixes prices, for the statute does not fix them or provide the means for fixing them. It is conceded by the Government that the so-called "price-committees" or "commissioners" appointed by the Department of Justice are wholly extra official, and that their action, while it may influence the Department, affords no legal protection to the merchant (Gov't Brief in *Kennington* v. *Palmer*, No. 367 of this Term, p. 9). The statute does not even have the merit of a price-fixing statute in establishing any uniform price or standard of prices. Nothing is provided by the Act to which the unfortunate merchant may appeal in his effort to conjecture the scope of its restriction. In each case, abandoning all the standards which free competition, or what Adam Smith called the "higgling of the market," may have provided, the jury is left to determine with respect to every particular transaction, albeit but an infinitesimal part of a large business—the course and results of which are not considered—that an "unreasonable" price has been charged.

The test, as the Court below construed the statute, is simply *the difference between cost and sell-*

ing price and the opinion the jury may have of the reasonableness of this difference. If a retail dealer bought a coat in 1916 for $40 and in October, 1919 (when the Act was passed), its market value was $80, and its value has further increased in 1920, although the sum of $80 by reason of the general rise in prices may amount to but little if any more in 1920 than $40 amounted to in 1916, still it is open to a jury to say that because the dealer had bought the coat for $40 and sold it for $80 he is guilty of a crime and should be fined or go to jail. He might still go to jail if he sold the coat for $60 although he could not replace it for much more.

The statute as thus construed would present a sufficiently serious question, if one was not engaged in trade and had only one coat to sell. But when he is dealing in clothing, and must go out of business unless he can replace his stock, a regulation of this kind would seem to be little short of grotesque. The statute, so construed, is of a character which neither affects nor regards market values.

It is axiomatic, that the trader, although money is used as a convenient medium, is really engaged in the exchange of commodities for commodities, and if he is to continue in trade he must take account of all the risks that attend the ever present necessity of replacement. In fixing prices, he must take account of what goods will be worth and money will buy when he comes to replenish his shelves. The ability to do this with accuracy is extremely rare, and hence the large percentage of failures in business, even in ordinary times. When goods are high, the play of economic forces will in time cause them to fall; a period of inflation will be followed by a period of depression, and

unless in times of high prices these risks are taken into account, the merchant must inevitably fail. It was not so long ago that raw silk was selling at upwards of $15 a pound; it is now selling at about $7 a pound, and merchants who were most prosperous only a short time ago are not only suffering from financial embarrassment but some have actually become suddenly insolvent because of the sharp decline. A rule which makes, especially in individual transactions, a comparison of cost and selling price the measure of unreasonableness without regard to market or replacement values is a rule upon which business could not be conducted. We may quote from a recent and admirable treatise on this subject "Does Price Fixing Destroy Liberty", by George H. Earle, Jr., of Philadelphia:

> "* * * Raw sugar advanced in price within the past year from five to ten cents per pound, and thence to twenty cents per pound, and even still further. If the refiner sold his sugars at a reasonable profit on the first price of five cents, the inevitable consequence would be that he could 'replace' only half of his necessary supplies. And then suppose, this supply, though only one-half his requirements, again advanced to twenty cents per pound for raw sugars, and he took but a living profit, he would have come within the Government's contention as to his duty under the terms of the Lever Act, even though each 'turn over' in such a course of business would bring him that degree closer to financial ruin" (*id.*, pp. 103, 104).

With the advance in the cost of labor and of raw materials, the cost of manufactured articles could not fail to advance, and at what point is

the unhappy dealer, who is expected to ignore the standard of fair and open competition—the only one that business knows, or the law hitherto has known—to fix the amount at which he can safely replace his stock and take all future risks inherent in his trade?

To be sure, these considerations are economic, but due process of law in dealing with property rights cannot be administered in a vacuum. Process of law which took no account of economics would be most arbitrary process and anything but "due". As was said by Mr. Justice Holmes in the *Northern Securities* case (193 U. S. pp. 197, 401, "at times Judges need for their work that training of economists or statesmen, and must act in view of their foresight of consequences." And the Lever Act cannot be judged either as to its construction or validity without taking account of fundamental economic considerations.

The constitutional right to engage in an ordinary lawful trade involves the right to continue in that trade and to sell goods in such manner that one can turn over his stock, take the risks of his business and have a measure of profit. Accordingly it is recognized that "the value of property results from the use to which it is put, and varies with the profitableness of that use, present and prospective, actual and anticipated. There is no pecuniary value outside of that which results from such use. The amount and profitable character of such use determines the value" (*Branson* v. *Bush*, 251 U. S. 182, 187). The conception of property thus necessarily involves the enjoyment of its use and the opportunity to realize its value. If one is denied either, his property is taken. Property is not its cost, but its worth; and just

compensation for property is not compensation for cost, but for value (*Reagan* v. *Farmers Loan & Trust Co.*, 154 U. S. 362, 409; *Minnesota Rate Cases*, 230 U. S. 352, 454).

Even a corporation engaged in a public undertaking is entitled to have taken into consideration, in the fixing of its rates for public service, the increased value of the property used in the service since its acquisition (*Willcox* v. *Consolidated Gas Co.*, 212 U. S. 19, 51), and its necessary replacements (*Knoxville* v. *Knoxville Water Co.*, 212 U. S. 1, 13).

As has been said, the Court below declined to permit the plaintiffs in error to prove the market value of the articles in question either at the time when the statute was enacted, or at the time the articles were marked for sale, or at the time they were sold. The Court went upon the theory that market value, although fixed by free competition in ordinary articles, in no sense the subject of monopoly or of unfair practice, was without relevancy. This was because the statute, as construed by the Court, ignored that standard.

Congress could not without compensation destroy the existing value of private property by imposing a regulation that it should be sold for less than its fair market value as it stood at the time of the enactment. Nor could Congress destroy the existing value of a business, as a going concern, and deprive a merchant of his liberty to conduct his business, by imposing a regulation requiring the liquidations of stocks at a price less than their fair market value at the time of the enactment and at a price less than that at which it was possible to replace them. Nor could Congress, it is further submitted, destroy the value of

a lawful business by refusing to the merchant engaged in it a fair opportunity of realizing upon his stocks and a further amount sufficient to afford a reasonable profit over and above the replacement value of such stocks in trade.

If Congress, on October 22, 1919, when for the first time it brought *wearing apparel* within the statute in question, had authorized the acquisition by the Government of the suits of clothes in the store of Weed's, Inc., the Government would have been compelled to pay the fair market value at the time of the appropriation, and, without provision for such payment, the attempted acquisition by Congress, despite the assertion of the war-power, or the fact that the appropriation took place in the midst of the actual conduct of war, would have been entirely nugatory. If Weed's, Inc. had had a contract with *X* for the sale of suits in question on October 22, 1919, and *X* had declined to carry out his contract, Weed's, Inc. would have been entitled in any court of justice to recover damages with respect to the then market value of the suits, and Congress could not have taken away such a cause of action from its owner without just compensation. In one court room, Weeds, Inc. would be recovering damages on this theory of its right to market value, while in an adjoining court room, it would be sentenced as a criminal for charging that market value as a selling price. We find it difficult to understand upon what theory it can be said that Congress, unable to take a suit of clothes for the use of a soldier without paying its fair market value, could validly require the owner of the suit to sell it for less, or if the owner was engaged in trade to sell such suits for a price which would not enable him to

replace them according to their fair market value, and thus practically compel him to go out of business.

Mr. Justice Brewer said in *Chicago & Northwestern R. R. Co.* v. *Dey*, 35 Fed. 866, 880, that it was no answer to say that, if a railroad company found that imposed rates would cause it to do business at a loss it might quit business and abandon its road. That, he said, would be "the very irony of despotism. Apples of Sodom were fruit of joy in comparison".

There being, then, no question upon this record, that Weed's, Inc. on October 22, 1919, owned certain articles of clothing, as a part of their stock in trade, which they had purchased long previous, and that under this statute as construed they were denied the opportunity to obtain the fair market value of these articles at the time the statute was passed, or the fair market or replacement value at the time of their sale, we submit that it necessarily follows that the statute having such an application, without compensation to the owner, constitutes a deprivation of property without due process of law.

Moreover, it is of the essence of due process of law that it shall not constitute arbitrary legislation which deprives a citizen of the equal protection of the laws. It is true that the words "equal protection of the laws" are not found in the Fifth Amendment, but the principle involved is included in the concept of due process of law.

Caldwell v. *Texas*, 137 U. S. 692, 697.
Giozza v. *Tiernan*, 148 U. S. 657, 662.
Brushaber v. *Union Pacific R. R. Co.*, 240 U. S. 1, 24, 25.

McGehee on Due Process of Law, p. 60.
2 Willoughby on the Constitution, pp. 873, 874.

The present statute arbitrarily deprives citizens of the equal protection of the laws and thus of due process of law. Thus, the theory of the Court below that the statute refers simply to the difference between cost and selling price, and that the jury is at liberty, regardless of fair market value, to treat the difference as an unreasonable one, permits A to escape while B is made a criminal, *although they sell the same staple on the same day at the fair market price*, because they bought the article at different times and hence at different costs.

Take, for example, the case of sugar, imported. When A imports, it costs him a given sum. The market is rising, and when B imports, it costs him a little more; and the market still rising, when C imports, it costs him a still greater sum. Then each having imported and having the right to sell, A, B and C sell on a given day at the market price. The Government assumes that A must go to jail because of his lower cost and is not entitled to the market price which B and C are permitted to enjoy.

Again, under this sort of regulation, if a clothing merchant has a stock of suits bought at different times, as is most likely to be the case, although on a given day they may all have the same fair market value, established by open competition, he must sell them at different prices or be guilty of a crime. What is a fair price to one customer becomes an extortionate price on the same day of the same article to another customer. The

absence of any standard, or uniform rule, but the establishment of a plan of regulation which takes account only of a jury's opinion of the difference between cost and selling price, makes it impossible for the merchant to assure a proper replacement value. A statute of such a sort does not establish a market value or a fixed basis for trade, but leaves to each merchant the risks of his dealing while market values may continue to rise.

(3) The Government, to support its contention, invokes the analogy of the police power of the States. We understand the proposition of the Government to be this (Gov't Brief, *Cohen Grocery Case,* pp. 19 *et seq.*):

That the States under our system have all the powers which inhered in the British Government prior to the Revolution, save only as these have since been surrendered to the Federal Government; that by virtue of these powers, the States respectively may fix the prices of commodities in private sales; and that Congress in the exercise of its war power can exert all the police power which a State could ordinarily exert over the same subject.

The foundation of the Government's argument is thus a most extraordinary assumption. It assumes that a State, despite the Fourteenth Amendment, has authority to fix the prices to be charged, in private sales, of all wearing apparel. It may be suggested that this view of the scope of the State's police power has not yet received the sanction of this Court (Compare *German Alliance Insurance Co.* v. *Kansas,* 233 U. S. 389, 415). The Government makes its appeal to the familiar statutes of an early period relating to forestall-

ing, regrating and engrossing and various statutes fixing prices (Gov't. Brief, *Cohen Grocery Case*, pp. 24, 25). Of these discredited efforts of an early period, Mr. Chief Justice White, writing for the Court in *Standard Oil Co.* v. *United States*, 221 U. S. 1, 55, said:

> "From the development of more accurate economic conceptions and the changes in conditions of society it came to be recognized that the acts prohibited by the engrossing, forestalling, etc., statutes did not have the harmful tendency which they were presumed to have when the legislation concerning them was enacted, and therefore did not justify the presumption which had previously been deduced from them, but, on the contrary, such acts tended to fructify and develop trade. See the Statutes of 12th George III, ch. 71, enacted in 1772, and Statute of 7 and 8 Victoria, ch. 24, enacted in 1844, repealing the prohibitions against engrossing, forestalling, etc., upon the express ground that the prohibited acts had come to be considered as favorable to the development of and not in restraint of trade. * * * This would seem to manifest, either consciously or intuitively, a profound conception as to the inevitable operation of economic forces and the equipoise or balance in favor of the protection of the rights of individuals which resulted. * * * After all, this was but an instinctive recognition of the truisms that the course of trade could not be made free by obstructing it and that an individual's right to trade could not be protected by destroying such right".

The due process clauses introduced into the State Constitutions recognized freedom of trade and put it beyond the power of State Legislatures to interfere with essential liberty in an ordinary lawful calling. And the due process clause of the

Fourteenth Amendment, as interpreted by this Court with due regard for the broad scope of the police power in protecting the life, health, safety and welfare of the people of a State, still recognizes the necessary restrictions—now enforced by Federal authority—which must be maintained in order that both liberty and property shall be secure. The recognition of protective legislative authority in matters with respect to monopolies, unfair practices, rates or charges for public service, and matters affected with a public interest (*Munn* v. *Illinois*, 94 U. S. 113; *Budd* v. *New York*, 143 U. S. 517; *Brass* v. *Stoeser*, 153 U. S. 391; *German Alliance Insurance Co.* v. *Kansas*, 233 U. S. 389), still leaves property rights protected from arbitrary or confiscatory regulation.

In the case last cited, the opinion of the Court answered the argument that its decision justified general price fixing by saying (233 U. S. p. 415):

> "But it is said that the reasoning of the opinion has the broad reach of subjecting to regulation every act of human endeavor and the price of every article of human use. We might, without much concern, leave our discussion to take care of itself against such misunderstanding or deductions. The principle we apply is definite and old and has, as we have pointed out, illustrating examples. And both by the expression of the principle and the citation of examples we have tried to confine our decision to the regulation of the business of insurance, it having become 'clothed with the public interest' and therefore 'subject to be controlled by the public to the common good.' "

The Government cannot measure State power, under the Fourteenth Amendment, by the statutes of Edward I.

But this does not exhaust the Government's assumption. For the assumption is not simply that the State could exercise its police power in fixing prices of all wearing apparel, but that the State Legislature, without fixing prices or establishing any standard of prices that it was possible to know, could deprive a trader of the right to realize either the fair market value of his stock as it stood at the time of the enactment, or its fair market value as it stood at the time of its sale. More than that, the Government assumes that the State Legislature, thus ignoring fair market values, and leaving it to a jury to say that in its opinion a price charged was unreasonable, although it was a fair market value, could make a merchant a criminal for realizing the fair market value of his goods when other merchants were left at liberty to obtain that market value.

The Government's assumption that a regulation of this sort is within the police power of the State is a wholly gratuitous and unwarranted one, and the entire foundation of the Government's argument disappears.

FOURTH.—The Court below construed the statute erroneously.

As a constitutional question is involved, this Court takes the entire case, and the question as to the correct construction of the statute is before the Court.

Towne v. *Eisner*, 245 U. S. 418.
Billings v. *United States*, 232 U. S. 261, 279.
Altman v. *United States*, 224 U. S. 583, 596, 597.

(1) Six of the seven counts upon which the defendants were convicted are under the provision of Section 4 of the amended Lever Act making it unlawful

> "to make any unjust or unreasonable *rate* or *charge* in handling or dealing in or with any necessaries."

The words "rate or charge" are not apt words to describe the *price* in a contract of sale. If Congress intended to hit prices fixed by individuals on sales of goods, it is difficult to suppose that Congress would have used the expression "rate or charge in handling or dealing in or with any necessaries." The reference apparently is to rates or charges for services in connection with handling, transporting, storing, etc., and the words "dealing in or with" would have on familiar principle a reference to transactions of a similar kind.

Congress in the same section, when it intended to refer to "prices" used the word "prices" (see Section 4, Subd. (e)), where the prohibition is against a combination or conspiracy "to exact excessive prices."

Further, the scheme of the statute must be taken into consideration, and it is to be observed that under Section 14 the President is authorized to fix a "guaranteed price" for wheat, and under Section 25 to fix the "price" of coal and coke. In short, the Act shows that when Congress had price-fixing in mind, or regulation of "prices," it said so, and Congress did not refer to "prices" in the provision of Section 4 upon which six of the counts in question rest.

(2) If, however, it is considered that the provision as to an "unjust or unreasonable rate or

charge" covers prices on contracts of sale, the construction of this provision by the Court below cannot, we submit, be sustained.

On the theory of the scope of the clause adopted below, the words "unjust or unreasonable rate or charge" are treated as having the same effect as the words "excessive prices" in Subdivision (e) of Section 4.

But what is the meaning of "excessive prices"? "Excessive prices" mean prices in excess of *something*. Plainly, reference is to a price exceeding some *standard* contemplated by the Act, and this must be a standard that dealers can know (*International Harvester Co.* v. *Kentucky*, 234 U. S. 216; *Collins* v. *Kentucky*, 234 U. S. 634).

It is also a fundamental rule that where a statute is susceptible of two constructions "by one of which grave and doubtful constitutional questions arise, and by the other of which such questions are avoided," the Court will adopt the latter (*United States* v. *Delaware & Hudson Co.*, 213 U. S. 366, 408; *Union Pacific R. Co.* v. *Laramie Stockyards*, 231 U. S. 190, 200). Again, the statute is a penal statute, and while a penal statute should not be construed arbitrarily, there is enough left of the old maxim to require that it should be construed sensibly and should not be stretched. To say that Congress in using the term "excessive prices" meant prices which exceeded something that no merchant could define, and which Congress did not attempt to define, is to wrest this highly penal statute from its proper meaning, and to give it a construction which not only raises grave doubt of its constitutionality, but, as we view it, makes it clearly unconstitutional.

The question, then, is, What standard did Congress contemplate when it used the expression "excessive prices"?

If an article were of an exceptional character, not the subject of ordinary trade, with a *pretium affectionis*, in the nature of things there would be no excessive price. The owner would have a constitutional right to sell it for what he could get for it or otherwise to hold it.

In the present statute, the reference is to staples, to the most familiar subject of every-day barter and trade. With respect to such articles there is a familiar standard, a legal standard, the standard every day judicially applied in giving legal effect to contracts of sale. There is a standard not only applied in this way, but also invariably applied when government steps in and exercises its sovereign power to take such property from the citizen.

This standard, of course, is the standard of *fair market value*, the value determined by the myriad wants of the community, the extent of the supply, and the intensity of the demand. It is a standard to the maintenance of which the power of government is constantly devoted. For when Acts in restraint of trade are condemned, and attempts to monopolize are made the subject of penal provision, the endeavor is to secure free competition in order that fair market prices may be established in the only way in which they can be established, and that is by getting rid of unfair practices and permitting the free play of economic forces.

If there had been no other clause in the section but the prohibition of conspiracies "to exact excessive prices," we can hardly conceive of a view of the statute which would ignore market values. The normal meaning of "excessive prices" would be prices which through the conspiracy were in-

tended to exceed the fair market value of the article.

Congress, in its war legislation, did not attempt to ignore the right of the citizen to the fair market value of his property. The Government was to make "just compensation" (see, *e. g.* Act of March 4, 1917, c. 180; 39 Stat. 1192, 1193) and where articles were taken with market value of course "just compensation" meant their fair market value. It may here be observed, as counsel noted in argument before the Court below, that even when Congress undertook to authorize the disposition of the nitrate of soda, which had been acquired during the war and was still on hand, by authorizing its sale to agricultural fertilizer distributors or users, it was provided that the sale should be made at the prevailing market price. Although this Act was passed, as it states, to meet an existing emergency in the shortage of fertilizers, it was directed that the Secretary of War should sell at the prevailing market price although this price was considerably in excess of what the Government had paid. (See Act of April 23, 1920, 264 Fed. p. 465, Sec. 6941-l, Cong. Rec. 66th Cong. 2nd Sess. pp. 5906-5907). It can hardly be supposed that Congress had the intent to compel purchasers from the Government to buy at market prices, while at the same time it was through the Lever Act compelling its citizens to sell for less than the fair market value of their wares. We repeat that "excessive prices" must be deemed to mean prices in excess of fair market value.

The question then is whether the words "unjust or unreasonable rate or charge in handling or dealing in or with any necessaries" should receive, so far as prices are concerned, a different interpretation from that properly to be given to

the phrase "excessive prices." It would be difficult to construe these expressions differently, as the only way of treating the words "rate or charge" as referring to prices at all would seem to be by a recognition of the same intent as governing both expressions. If this be so, "unjust or unreasonable rate or charge" would refer to the same standard to which the expression "excessive prices" should be deemed to refer.

The word "unreasonable," if the provision can be sustained, must imply some standard, and a standard that a merchant can know. The word "unreasonable" as applied to a price, like the word "excessive," would normally be taken to mean, when referring to a staple, where there is a free market and a fair market price fixed by competition, to the fair market value of the article.

The statute says nothing about profits, or percentage of profit. It deals, on the assumption that it applies at all, with prices, and we ask—Upon what ground can it be said that a merchant is charging an "unjust" or "unreasonable" price when he is charging the fair market value of his article?

Moreover, when we are referring to "market values," it is not necessary to consider in this case simply the question of retail values. The Court below refused to permit evidence of the wholesale market value and held that the statute ignored it. The wholesale market value necessarily represented to the merchant the replacement value of his stock in trade. If the consideration of profit can be deemed to affect the matter under this statute, then certainly the retail merchant would at least have the right to a reasonable profit upon the wholesale market value. But to disregard market values altogether, and to take sim-

ply the difference between the cost to the merchant of a particular article and its selling price, and to leave it to a jury to say whether or not the difference was unreasonable, is to make a different statute from that which Congress enacted, and to give a construction to the statute which necessarily renders it invalid.

The law knows no standard of profits. The only standard that a merchant has, and the only standard recognized by the law, with respect to prices, is the standard of market value.

The use of the words "unjust" and "unreasonable," with respect to transactions in trade, must be deemed to refer, if they are not utterly indeterminate, to conduct which is in restraint of trade, or to unfair practices which embarrass and obstruct the free flow of commerce and thus interfere with the free competition upon which the law insists. To give the words "unjust" and "unreasonable" a wider import, is to ignore their historical setting.

In *Standard Oil Company* v. *United States*, 221 U. S. 1, in considering the meaning of the words contracts, combinations and conspiracies "in restraint of commerce among the several States" and "attempts to monopolize" and "monopolize," this Court, speaking through Mr. Chief Justice White, said (*id.*, p. 51) that the endeavor would be made to seek their meaning by reference "to the elementary and indisputable conceptions of both the English and American law on the subject prior to the passage of the Anti-trust Act." Mr. Chief Justice White continued (*id.*, pp. 56, 57, 58, 60, 62; italics ours):

> "From the review just made it clearly results that outside of the restrictions resulting from the want of power in an individual

to voluntarily and unreasonably restrain his right to carry on his trade or business and outside of the want of right to restrain the free course of trade by contracts or acts which implied a wrongful purpose, freedom to contract and to abstain from contracting and to exercise every reasonable right incident thereto became the rule of the English law. The scope and effect of this freedom to trade and contract is clearly shown by the decision in *Mogul Steamship Co.* v. *McGregor* (1892), A. C. 25.

* * * * * *

"It is also true that while the principles concerning contracts in restraint of trade, that is, voluntary restraint put by a person on his right to pursue his calling, hence only operating subjectively, came generally to be recognized in accordance with the English rule, it came moreover to pass that contracts or acts which it was considered had a monopolistic tendency, especially those which were thought to unduly diminish competition and hence to enhance prices—in other words, to monopolize—came also in a generic sense to be spoken of and treated as they had been in England, as restricting the due course of trade, and therefore as being in restraint of trade. The dread of monopoly as an emanation of governmental power, while it passed at an early date out of mind in this country, as a result of the structure of our Government, did not serve to assuage the fear as to the evil consequences which might arise from the acts of individuals producing or tending to produce the consequences of monopoly. It resulted that treating such acts as we have said as amounting to monopoly, sometimes constitutional restrictions, again legislative enactments or judicial decisions, served to enforce and illustrate the purpose to prevent the occurrence of the evils recognized in the mother country as consequent upon monop-

oly, by providing against contracts or acts of individuals or combinations of individuals or corporations deemed to be conducive to such results.

* * * * * *

"Without going into detail and but very briefly surveying the whole field, it may be with accuracy said that the dread of enhancement of prices and of other wrongs which it was thought *would flow from the undue limitation on competitive conditions* caused by contracts or other acts of individuals or corporations, led, as a matter of public policy, to the prohibition or treating as illegal all contracts or acts which were unreasonably restrictive of competitive conditions, either from the nature or character of the contract or act or where the surrounding circumstances were such as to justify the conclusion that they had not been entered into or performed with the legitimate purpose of reasonably forwarding personal interest and developing trade, but on the contrary were of such a character as to give rise to the inference or presumption that they had been entered into or done with the intent to do wrong to the general public and to limit the right of individuals, thus restraining the free flow of commerce and tending to bring about the evils, such as enhancement of prices, which were considered to be against public policy.

* * * * * *

"Thus not specifying but indubitably contemplating and requiring a standard, it follows that it was intended that the standard of reason which had been applied at the common law and in this country in dealing with subjects of the character embraced by the statute, was intended to be the measure used for the purpose of determining whether in a given case a particular act had or had not brought about the wrong against which the statute provided.

* * * * * *

"And it is worthy of observation, as we have previously remarked concerning the common law, that although the statute by the comprehensiveness of the enumerations embodied in both the first and second sections makes it certain that its purpose was to prevent undue restraints of every kind or nature, nevertheless by the omission of any direct prohibition against monopoly in the concrete it indicates a consciousness that the freedom of the individual right to contract when not unduly or improperly exercised was the most efficient means for the prevention of monopoly, since the operation of the centrifugal and centripetal forces resulting from the right to freely contract was the means by which monopoly would be inevitably prevented if no extraneous or sovereign power imposed it and no right to make unlawful contracts having a monopolistic tendency were permitted. In other words, that freedom to contract was the essence of freedom from undue restraint on the right to contract."

And in *United States* v. *American Tobacco Company*, 221 U. S. 106, 180, the Court said:

"The soundness of the rule that the statute should receive a reasonable construction, after further mature deliberation, we see no reason to doubt. Indeed, the necessity for not departing in this case from the standard of the rule of reason which is universal in its application is so plainly required in order to give effect to the remedial purposes which the act under consideration contemplates, and *to prevent that act from destroying all liberty of contract and all substantial right to trade*, and thus causing the act to be at war with itself by annihilating the fundamental right of freedom to trade which, on the very face of the act, it was enacted to preserve, is illustrated by the record before us." (Italics ours.)

And, in again stating the rule of reason, the Court said in the *Tobacco case* (*id.*, p. 179):

> "Applying the rule of reason to the construction of the statute, it was held in the *Standard Oil Case* that as the words 'restraint of trade' at common law and in the law of this country at the time of the adoption of the Anti-trust Act only embraced acts or contracts or agreements or combinations *which operated to the prejudice of the public interests by unduly restricting competition or unduly obstructing the due course of trade or which, either because of their inherent nature or effect or because of the evident purpose of the acts, etc., injuriously restrained trade, that the words as used in the statute were designed to have and did have but a like significance. It was therefore pointed out that the statute did not forbid or restrain the power to make normal and usual contracts to further trade by resorting to all normal methods, whether by agreement or otherwise, to accomplish such purpose.*" (Italics ours.)

As was said in *United States* v. *Union Pacific R. R. Co.*, 226 U. S. 61, 82, re-stating the conclusion thus reached:

> "The Act is intended to reach combinations and conspiracies which restrain freedom of action in interstate trade and commerce and unduly suppress or restrict the play of competition in conduct thereof."

The rule of reason is the rule that must be taken to define what is unreasonable, and in connection with contracts in restraint of trade, or conduct which led, as the Court had pointed out, to the enhancement of prices, the conduct that was thus found to be "unjust" and "unreasonable" was the conduct which *unduly restricted competition* or

unduly obstructed *the due course of trade* or which, because of the inherent nature of the acts, injuriously restrained trade. But the power to make normal and usual contracts, the resort to free and open competition, did not offend the rule of reason because from the standpoint of the law such conduct was neither unjust nor unreasonable.

"Excessive price," if this term have any legal significance, is a price produced *by illegal or unnatural means and not by free competition.* "Unreasonable" price, if this term has any legal significance, means a price reached by some illegal or unnatural practice, the illegality being defined by the conceptions of the law so clearly set forth in the opinions we have quoted. We shall not undertake to comment upon the economic futility of an attempt to establish by statute fair prices of ordinary articles of commerce which are the subjects of open competitive dealing. But, if statutory price-fixing of ordinary articles is a futile proceeding, what shall be said of a statute like this, which does not even give a statutory standard price, but menaces every merchant, however honorable, and deprives him of the fair market value of his wares. Aside from any question of the economic effect of the statute, we insist that as a matter of mere statutory construction the words "unjust or unreasonable" or "excessive" cannot be regarded as ignoring all prior legal conceptions, and thus by departing from the only standard known to the law as intended to leave it to a jury to say what profit it thinks a merchant should make upon a comparison of the cost and selling prices of particular articles.

In the present case there is no suggestion of any method or practice on the part of the plain-

tiffs in error which prior to the enactment of the Lever Act could have been regarded under the law as "unjust" or "unreasonable." If Congress in enacting the Lever Act meant to refer to any standard already existing, by the use of the words "unjust" or "unreasonable", then by every such standard there was no unjust or unreasonable price. If Congress attempted to authorize a departure from every known standard of reasonableness, and to disregard the standards erected by fair and free competition, then it is apparent that it utterly failed to define any standard whatever.

We ask the Court, in construing this statute, under which honorable merchants, with unblemished reputation in their community, have been convicted as criminals—*What upon this record have they done which prior to the Lever Act any court could have regarded as unjust or unreasonable? And if what the plaintiffs in error did was not "unjust" or "unreasonable" under the law as it stood prior to the Lever Act, by what criterion furnished by that Act is their rate or charge or price to be held to be unjust, unreasonable or excessive?*

The argument that if this be the true view of the statute, there was no reason for its enactment, as an Act merely appealing to existing standards, is manifestly without merit. The terms of the Act cannot be changed by any such suggestion, and even Legislatures sometimes enact futilities. But, apart from this, the manifest purpose was to make the objectionable conduct criminal and to af-

fix Federal penalties. Whether Congress had any power to do this we discuss elsewhere, but that is a matter apart from its intent.

Congress evidently sought to make certain conduct a Federal crime, which aside from the enactment would not have been a Federal crime, however objectionable it might be. The question, then, is, What is the conduct thus sought to be penalized? That conduct is defined simply by the words "unjust", "unreasonable" and "excessive". If these words refer to no standard, the Act is void, plainly. If they do refer to a standard, it must be some existing standard of the law. And there is none such except the standard of fair market values established by free competition, and it is precisely that standard which the plaintiffs in error have invoked in vain because the Court has construed the statute as disregarding it.

FIFTH.—The statute, as construed by the Court below, does not validly define a criminal offense and by reason of its uncertainty is invalid under the Fifth and Sixth Amendments.

The statute, as the Court below construed it, ignores the standard of fair market value, not only depriving the merchant of the worth of his property in the market, but of his opportunity to measure prices by the market. In disregarding market values as fixed by free competition, the statute necessarily disregards altogether the criterion of *worth*. If it be said that the intention is to refer to some supposed standard of *"real value"* as distinguished from market value, it at

once encounters the fatal objection which was urged against the statute in *International Harvester Co.* v. *Kentucky*, 234 U. S. 216. For there the statute, as construed by the State court, attempted to make it a criminal offense to sell harvesters, etc., at a price "in excess of their real value". The dealer was compelled to imagine conditions other than those that actually existed, and in the light of conjectural circumstances guess at his peril the "real value" of his commodity. This statute was aimed at an abnormal situation, existing in the absence of free competition, and the legislative endeavor was to compel the dealer to refer to a standard which did not exist. The Court said that this situation concerned the constitutional question, "for it shows how impossible it is to think away the principal facts of the case as it exists and say what would have been the price in an imaginary world" (*id.* 222). "Value", said the Court, "is the effect in exchange of the relative social desire for compared objects expressed in terms of a common denominator. It is a fact and generally is more or less easy to ascertain". But the Legislature had no power to compel the dealer to refer to some standard of "real value" which ignored actual conditions, as this was an attempt to prescribe a standard of conduct that it was not possible to know (see *Collins* v. *Kentucky*, 234 U. S. 634, 638). The statute in the present case cannot therefore be sustained by reference to some supposed "real value", as distinguished from market value under the conditions that actually existed, and as it ignores the latter it must be taken to disregard the *worth* of articles altogether.

Then, as already stated, the statute does not fix prices or establish any machinery for fixing prices.

Even in a case where prices or rates may be fixed constitutionally, the rate-making power is unconstitutionally exercised if penalties are imposed in the endeavor to compel obedience without any opportunity to resort to a judicial review to determine the propriety of the rates. In *Oklahoma Operating Co.* v. *Love*, 252 U. S. 331, an order of the State Corporation Commission had declared a laundry to be a monopoly and its business public, and had limited its rates. But under the constitution and laws of Oklahoma, no Court of the State, except the Supreme Court by way of appeal could review, correct or annul any action of the Commission within the scope of its authority or suspend its execution, and the Supreme Court might not review an order fixing rates by direct appeal from such order. The only judicial review of an order fixing rates that was found to be possible under the laws of the State, was that arising in proceedings to punish for contempt. But the penalties which might be imposed, if this course were pursued without success, were such as to deter "even the boldest and most confident". It was said that obviously a judicial review beset by such deterrents does not satisfy the constitutional requirements, even if otherwise adequate, and therefore that the provisions of the Acts relating to the enforcement of the rates by penalties were unconstitutional without regard to the question of the insufficiency of those rates. Accordingly, it was held that the plaintiff was entitled to a temporary injunction restraining the Corporation Commission from enforcing the penalties and that the suit should proceed for the purpose of determining whether the maximum rates fixed by the Commission were under existing conditions confiscatory.

So that, here, if there had been an attempt to fix prices and there was no opportunity for judicial review in order to secure protection against a confiscatory imposition, the merchant would have been entitled to the intervention of a Federal Court of equity under the Constitution to stay the enforcement of penalties until the validity of the rates could properly be examined (see *Ex-Parte Young*, 209 U. S. 123, 147; *Missouri Pacific Ry. Co. v. Tucker*, 230 U. S. 343, 349; *Wadley Southern Ry. Co.* v. *Georgia*, 235 U. S. 651, 662). But as the present statute does not attempt to fix prices, or to provide any machinery for fixing prices, the unfortunate merchant is under a penalty of criminal prosecution with no possible redress *unless he is able to conjecture in advance what a jury may think, with respect to the sale of each particular article in which he deals, he should be allowed as the difference between the cost of that particular article and the price he charges.* There is nothing in the way of judicial determination that can intervene between his act and criminal prosecution.

If the provision that the accused in all criminal prosecutions shall "be informed of the nature and cause of the accusation" is not a meaningless form of words, it would seem to be clear that legislation of this sort cannot be regarded as validly defining a crime.

For what is the meaning of the "nature and cause of the accusation"? Does it mean that it is sufficient to say that he is charged with what is "unjust" or "improper" or "wrong" or "unreasonable" without reference to any criterion of justice, propriety, right or reason? This would be after the manner of the Chinese Penal Code, to

which Mr. Justice Brewer refers in *Railroad Co. v. Dey*, 35 Fed. 866, 876, where it was provided:

> "Whoever is guilty of improper conduct, and of such as is contrary to the spirit of the laws, though not a breach of any specific part of it, shall be punished at least forty blows; and when the impropriety is of very serious nature, with eighty blows."

If such legislation as the present statute is valid, if imprisonment can be imposed under such wholly uncertain provisions, then Congress could very easily rid itself of all necessity for the exercise of legislative power, within the limits heretofore supposed to exist, by simply enacting that any man that does anything "wrong" or "improper" or "unreasonable" shall be fined and imprisoned. Indeed, such an Act would be far more easily sustained than the present one, for as to a good many things there would be criteria of right and reasonableness which are non-existent here. Is it not perfectly clear that, wherever Congress has a price fixing power, Congress is bound to fix prices with reference to some standards, and that Congress cannot put all ordinary lawful trade under penalty of criminal prosecutions by mere reference to prices as "unjust" or "unreasonable" or "excessive" without any definition of standard?

It will not do to say that Section 4 is aimed at conspiracies, and that conspiracies or combinations to enhance the price of an article fall within a defined category. It may be pointed out that this would apply only to the first count, which is the only conspiracy count in the indictment. But, aside from this, even as to this count the point is without merit, for if the case fell within the sup-

posed category, the criterion of fair price, which furnished a standard for determining the enhancement, would be the fair market value fixed by free competition; and, under the ruling of the Court below, this standard is disregarded by the present statute. All the counts but one deal simply with the act of an individual, and are based upon the provision prohibiting the making of "any unjust or unreasonable charge."

There can be no question as to the principle involved, that a penal statute must, to be valid, define the conduct penalized with appropriate certainty; and that this means that it must create, or refer to, a standard which the person subsequently accused of its violation may know in advance.

In *United States* v. *Reese*, 92 U. S. 214, 219, 220, 221, the Court, through Mr. Chief Justice Waite, said:

> "Laws which prohibit the doing of things and provide a punishment for their violation should have no double meaning. A citizen should not unnecessarily be placed where, by an honest error in the construction of a penal statute, he may be subjected to a prosecution for a false oath; an inspector of elections should not be put in jeopardy because he, with equal honesty, entertains an opposite opinion.
> * * * * * *
> "If the legislature undertakes to define by statute a new offense and provide for its punishment, it should express its will in language that need not deceive the common mind. Every man should be able to know with certainty when he is committing a crime.
> * * * * * *
> "It would certainly be dangerous if the leg-

islature could set a net large enough to catch all possible offenders, and leaving it to the courts to step inside and say who could be rightfully detained and who should be set at liberty."

In *United States* v. *Brewer*, 139 U. S. 278, 288, the familiar rule was thus stated:

"Laws which create crime ought to be so explicit that all men subject to their penalties may know what acts it is their duty to avoid. *United States* v. *Sharp*, Pet. C. C. 118. Before a man can be punished, his case must be plainly and unmistakably within the statute. *United States* v. *Lacher*, 134 U. S. 624, 628."

In *Louisville & Nashville R. Co.* v. *Railroad Commission*, 19 Fed. 679, 691, the Court said:

"The complainant insists that the act is too indefinite to sustain a suit for the penalties therein imposed, the offenses for which said penalties are to be inflicted not being sufficiently defined. The definition of the two principal of these offenses, is,—*First*, the taking of 'unjust and unreasonable compensation;' and, *secondly*, the making of 'unjust and unreasonable discriminations.' But what is unjust and unreasonable compensation, and unjust and unreasonable discrimination? And can an action, *quasi* criminal, be predicated thereon? It was expressly held to the contrary in the case of *Cowan* v. *East Tenn. V. & G. R. Co.*, decided a few years since, at Knoxville, (but not reported,) because, as the learned judge said, 'it would have to be left to a jury, upon the proof, to say whether the difference' in the rates 'was discrimination or not,' and that the same difference 'might in one instance be held a violation of the law and in another not,' thus making the guilt or innocence of the accused dependent upon the

finding of the jury, and not upon a construction of the act. 'This,' he said, 'I think cannot be done.' If this decision is authoritative, it is conclusive of this part of this case. We think the decision clearly right."

There was a similar application of the rule by Mr. Justice Brewer, sitting in Circuit, in *Tozer* v. *United States*, 52 Fed. 917, 919, 920, which applied the doctrine recognized in the *Dey* case, *supra*. Mr. Justice Brewer said:

"But, in order to constitute a crime, the act must be one which the party is able to know in advance whether it is criminal or not. The criminality of an act cannot depend upon whether a jury may think it reasonable or unreasonable. There must be some definiteness and certainty. In the case of *Railway Co.* v. *Dey*, 35 Fed. Rep. 866, 876, I had occasion to discuss this matter, and I quote therefrom as follows:

" 'Now, the contention of complainant is that the substance of these provisions is that, if a railroad company charges an unreasonable rate, it shall be deemed a criminal, and punished by fine, and that such a statute is too indefinite and uncertain, no man being able to tell in advance what in fact is, or what any jury will find to be, a reasonable rate. If this were the construction to be placed upon this act as a whole, it would certainly be obnoxious to complainant's criticism, for no penal law can be sustained unless its mandates are so clearly expressed that any ordinary person can determine in advance what he may and what he may not do under it.' * * *

"Applying that doctrine in this case, and eliminating the idea that the through rate is a standard of comparison of the local rate, there is nothing to justify a verdict of guilty against the defendant."

The case of *Louisville & Nashville R. Co.* v. *Commonwealth*, 99 Kentucky 132, involved substantially the same point. The Court said:

> "That this statute leaves uncertain what shall be deemed a 'just and reasonable rate or toll or compensation' cannot be denied; and that different juries might reach different conclusions on the same testimony, as to whether or not an offense has been committed, must also be conceded. The criminality of the carriers' act, therefore, depends on the jury's view of the reasonableness of the rate charged. And this latter depends on many uncertain and complicated elements. That the corporation has fixed a rate which it considers will bring it only a fair return for its investment, does not alter the nature of the act. Under this statute it is still a crime, although it cannot be known to be such until after an investigation by a jury, and then only in that particular case, as another jury may take a different view, and, holding the rates reasonable, find the same act not to constitute an offense. There is no standard whatever fixed by the statute, or admitted to be fixed, by which the carrier may regulate its conduct. * * *
>
> "If the infliction of the penalties prescribed by this statute would not be the taking of property without due process of law, but in violation of both State and Federal Constitutions, we are not able to comprehend the force of our organic laws."

See also:

United States v. *Capital Traction Co.*, 34 App. Cas. (D. C.) 92.

Baltimore & Ohio R. Co. v. *Railroad Commission of Indiana*, 196 Fed. 680.

Hocking Valley Co. v. *United States*, 210 Fed. 735, 743.

Chicago, M. & St. P. R. R. Co. v. *Polt*, 232 U. S. 165.

In *International Harvester Co.* v. *Kentucky*, 234 U. S. 216, 221, and *Collins* v. *Kentucky*, 234 U. S. 634, as already noted, it was the absence of any standard of conduct that could be known in advance that was held to invalidate the statute.

There is a still later reference to the principle in the case of *United States* v. *Pennsylvania R. R. Co.*, 242 U. S., 208, 237, 238, which related to an order of the Interstate Commerce Commission requiring carriers to furnish oil tank cars. It was found that the order did not lie within the authority of the Commission, but the Court also dealt with an objection, as to the uncertainty of the order, in the following words:

> "Again, it is charged that the order expressed but a legislative principle, has the generality of such principle without any criterion of application. The order requires the company to 'provide * * * upon reasonable request and reasonable notice, at complainants' respective refineries, tank cars in sufficient number to transport said complainants' normal shipments in interstate commerce.' What is a reasonable request or reasonable notice, and what are normal shipments? The order affords no answer and if the railroad company ventures, however honestly, any resistance to a request or notice not deemed reasonable or to shipments not deemed normal it must exercise this right at the risk of a penalty of $5,000 a day against all of its responsible officers and agents. These considerations are very serious (*International Harvester Co.* v. *Kentucky*, 234 U. S. 216; *Collins* v. *Kentucky*, 234 U. S. 634), but the view we have taken of the power of the Commission to make the order, however definite and circumscribed it might have been made, renders it unnecessary to pass upon the contentions."

The question, then, is, whether the Section 4 of the Lever Act, in its application to prices, does refer to a standard with any proper definiteness or certainty. Manifestly, the Act itself creates no standard. And, as we have pointed out, the conduct which under the statute as construed below is found to be criminal, was not *prior* to the statute "unjust" or "unreasonable" according to any conception of the law. Before October 22, 1919, when the amended Act was passed, the sale of these articles by the plaintiffs in error at the prices charged would not under the common law, civil or criminal, have raised any question of reasonableness. Then how can it be said that the Act, which simply refers to what is "unjust" or "unreasonable", makes it a criminal offense to do that which before the passage of the Act was not unjust or unreasonable?

This is the obvious distinction between the present case and such a case as that of *Nash* v. *United States*, 229 U. S. 373. That case was a criminal prosecution under the Sherman Anti-Trust Act. But as to this Act the rule of duty had been deduced, as stated in the *Standard Oil case*, "in the light of the common law and the law of this country at the time of its adoption" (221 U. S. p: 49). And the Court there said (*id.* p. 60):

> "Thus not specifying but *indubitably contemplating and requiring a standard*, it follows that it was intended that the standard of reason *which had been applied at the common law and in this country in dealing with subjects of the character embraced by the statute*, was intended to be the measure used for the purpose of determining whether in a given case a particular act had or had not brought about the wrong against which the statute provided" (italics ours).

Thus it is an entire misconception of the construction of the Sherman Anti-Trust Act to say that it attempted to make criminal, by reference to what was "unjust or unreasonable", conduct which had not been regarded from the standpoint of the law as unjust or unreasonable.

Accordingly this Court in the *Nash case*, speaking through Mr. Justice Holmes, referred to "the common law as to restraint of trade thus taken up by the statute" (229 U. S. p. 377). And Mr. Justice Holmes went on to say that the law was "full of instances where a man's fate depends on his estimating rightly, that is, as the jury subsequently estimates it, some matter of degree". He instanced homicide, which might be "'murder, manslaughter or misadventure, according to the degree of danger attending it' by common experience in the circumstances known to the actor", and he also referred to the familiar instance of negligence. But the learned Justice, in this exposition, was dealing with the content of the law, with conceptions familiar to the law and established in the law by "common experience in the circumstances known to the actor". There was no departure from the principle that a criminal statute requires a standard, and a standard that may be known in advance.

The distinction is that in the present case *there is no standard whatever*. Under Section 4 of the Lever Act, as construed by the Court below, there is no common law taken up by the statute. There is no instance in the common law to which the statute refers. There is no legal conception of reasonableness which the statute invokes. When one is dealing with questions of care, or diligence or the various instances to which the Court refers in the *Nash* case in illustrating the significance

of matters of degree, the Court is dealing with standards which have been erected in the experience of mankind which have received such certainty of definition in the common judgment as to be admitted to the body of the common law and, thus recognized by the Court, under limitations of judicial instruction, are committed to juries for the purpose of enforcement.

This familiar principle, which gives reasonable scope to legislation, by denying the necessity of adherence to any artificial formula, has not the slightest application where the acts concerned have not previously been viewed as unjust, or unreasonable, or wrong, or illegal, according to any concept of the law, and the Legislature has not attempted to supply a definition in order to supplement the common law. Here, there is no category of the law which affords any guide by which the citizen may govern his conduct. It is left to the jury both to define and convict. The crime with respect to the price of an article sold in trade, as the statute is construed by the Court below, is essentially a new thing; it is without ancestry in the law and has no legal relations which aid any attempt at definition.

The opinion in the *Nash case* refers to the case of *Waters-Pierce Oil Co.* v. *Texas*, 212 U. S. 86, 109. But the latter case distinctly recognized the principle laid down in *Tozer* v. *United States*, *supra*, and *Railway Co.* v. *Dey*, *supra*, and *Louisville & Nashville Railway Co.* v. *Commonwealth*, *supra*, and held that the Texas statutes in question in the *Waters-Pierce case* did "*not* give the broad power to a court or jury to determine the criminal character of the act in accordance with their belief as to whether it is reasonable or un-

reasonable, as do the statutes condemned in the cases cited."

In the *Waters-Pierce* case, the question arose under an anti-monopoly statute which prohibited acts which were "reasonably calculated" and "tended" to accomplish the prohibited result. But in that case the result lay within the familiar field of the law with respect to monopoly and restraint of trade, and the words "reasonably calculated" and "tended" did no more than apply the common law of *"attempts."* As the Court said: "It is not uncommon in criminal law to punish not only a completed act, but also acts which attempt to bring about the prohibited result." And the Court examined the cases which discussed what is essential to constitute in law an "attempt." The Court thus construed the statute as coming within one of the categories of the law and not as lying without them.

In *Fox* v. *State of Washington,* 235 U. S. 273, the statute denounced willful printing, circulation, etc., or matter advocating or encouraging the commission of any crime or breach of the peace. The statute was found to be referable to legal standards, for the Court held (p. 277) that it laid hold of "encouragements that, apart from statutes, if directed to a particular person's conduct, generally would make him who uttered them guilty of a misdemeanor if not an accomplice or principal in the crime encouraged." The sort of conduct which encourages crime in the sense that it *aids* or *abets* the perpetration of crime so as to make one an accomplice or a principal, is well known. And the statute as construed fell within a familiar category of the law.

In *Miller* v. *Strahl,* 239 U. S. 426, the statute related to the conduct of innkeepers with respect

to the protection of guests in case of fire. The statute particularized what should be done with respect to the employment of watchmen, the use of fire alarm gongs, etc., and added that it should be the duty of the innkeeper "to do all in his power" to save his guests. The opinion shows that the words in question were read in the light of their context as describing the degree of care required in taking available precautions.

In *Omaechevarria* v. *Idaho,* 246 U. S. 343, the law of Idaho prohibited a person owning sheep from allowing them to graze on a range "usually occupied by any cattle grower either as a spring, summer or winter range for his cattle." Objection was taken to the statute because of the reference to the prior occupation as a "usual" one. But this reference to what was customary did not go beyond the bounds of a permissible generalization and referred to a standard well understood by everyone familiar with the cattle ranges.

SIXTH.—The statute in question is arbitrary class legislation in violation of the Federal Constitution.

Section 4 of the Lever Act as amended by the Act of October 22, 1919, contains these provisos:

> "*Provided,* That this section shall not apply to any farmer, gardener, horticulturist, vineyardist, planter, ranchman, dairyman, stockman, or other agriculturist, with respect to the farm products produced or raised upon land owned, leased, or cultivated by him: *Provided further,* That nothing in this Act shall be construed to forbid or make unlawful collective bargaining by any co-operative as-

sociation or other association of farmers, dairymen, gardeners, or other producers of farm products with respect to the farm products produced or raised by its members upon land owned, leased, or cultivated by them."

In other words, producers of coal, manufacturers and dealers in farm machinery and equipment, manufacturers and dealers in mining machinery, refiners of sugar, dealers in food products, all those who are engaged in industry and trade (outside the favored class) who have to do with the production, manufacture or distribution of the described commodities are compelled to conduct their activities on pain of criminal prosecution if they make an "unjust" or "unreasonable" rate or charge "in handling or dealing in or with any necessaries," but farmers, gardeners, ranchmen, dairymen and stockmen or other agriculturists with respect to their farm products may make "unjust" and "unreasonable" rates and charges with impunity.

The Lever Act was originally passed as a war measure in relation to the food and fuel supply. The amendment of October 22, 1919, continued the Act as to food, feeds and fuel, and added wearing apparel. It had been asserted in the first section of the Act, as enacted in August, 1917, that the Act was passed by reason of the existence of a state of war, and as being essential to the national security and defense and for the successful prosecution of the war, and for the support and maintenance of the Army and Navy, to the end that an adequate supply and equitable distribution of food and fuel should be assured. It was for these purposes that the instrumentalities, means, methods and powers and prohibitions were

established, conferred and prescribed (Sec. 1).

If regard be had to these broad purposes, there can be no possible reason for excepting any class of citizens from application of the statute with respect to the commodities described.

The Government, in its effort to support the exception of favored classes, raises the question whether the provision of Section 4, as to making "any unjust or unreasonable rate or charge in handling or dealing in or with any necessaries" applies to producers (Govt. brief in *Tedrow* v. *Lewis*, No. 357 of this Term, p. 21). The Department of Justice, which is now driven to this contention in the effort to sustain the Act, has heretofore, as we happen to know, been prosecuting with the utmost vigor, not only manufacturers, but even those who are not manufacturers of the described commodities. Thus, the Government has endeavored to stretch the statute to cover manufacturers who do not make or deal at all in wearing apparel and lie outside the Act (*United States* v. *American Woolen Co.*, 265 Fed. 404).

It will be observed that in Section 5 of the Lever Act, relating to the licensing of "importation, manufacture, storage, mining or distribution" of the described necessaries, there was a proviso excepting farmers, gardeners, etc. The Government refers to this section in its brief in the *Cohen Grocery* case (No. 324 of this Term, pp. 3-6). Apart from this, Section 4 of the Lever Act (the Section in question) makes it a criminal offense for "any person" to make "any unjust or unreasonable rate or charge" in handling or dealing in or with any of the described necessaries, and it makes it a criminal offense for any person to conspire or combine with any other person

"(a) to limit the facilities for transporting, producing, harvesting, manufacturing, supplying, storing or dealing in any necessaries;

"(b) to restrict the supply of any necessaries;

"(c) to restrict distribution of any necessaries;

"(d) to prevent, limit, or lessen the manufacture or production of any necessaries in order to enhance the price thereof; or

"(e) to exact excessive prices for any necessaries."

The proviso follows that this shall not apply "to any farmer, gardener, horticulturist * * * or other agriculturist, with respect to the farm products produced or raised upon land owned, leased or cultivated by him." Thus, according to the terms of this Act, which was passed originally to protect the food supply, *farmers, gardeners, etc., are permitted, so far as this statute is concerned, to conspire, combine, agree or arrange to limit facilities, restrict supplies, restrict distribution, prevent, limit or lessen production, and exact excessive prices.* They are excepted from the provisions applying to other persons who conspire for such purposes.

Section 4, as amended, which contains this discrimination in favor of farmers, etc., comes directly within the ruling of this Court in

Connolly v. *Union Sewer Pipe Company*, 184 U. S. 540.

There the Court was dealing with the Anti-Trust Act of Illinois, condemning trusts or combinations or conspiracies to limit production, prevent competition and fix prices. The Act contained this proviso (*id.* p. 554):

"Sec. 9. The provisions of this act shall not apply to agricultural products or live stock while in the hands of the producer or raiser."

And because it contained this utterly indefensible attempt to subject certain portions of the community to restrictions from which the favored class was to be free, the Court held the statute to be unconstitutional and void. The Court said (*id.* pp. 563-564):

"Returning to the particular case before us, and repeating or summarizing some thoughts already expressed, it may be observed that *if combinations of capital, skill or acts, in respect of the sale or purchase of goods, merchandise or commodities, whereby such combinations may, for their benefit exclusively, control or establish prices, are hurtful to the public interests and should be suppressed, it is impossible to perceive why like combinations in respect of agricultural products and live stock are not also hurtful. Two or more engaged in selling dry goods, or groceries, or meats, or fuel, or clothing, or medicines, are, under the statute, criminals, and subject to a fine, if they combine their capital, skill or acts for the purpose of establishing, controlling, increasing or reducing prices, or of preventing free and unrestrained competition amongst themselves or others in the sale of their goods or merchandise; but their neighbors, who happen to be agriculturists and live stock raisers, may make combinations of that character in reference to their grain or live stock without incurring the prescribed penalty.* Under what rule of permissible classification can such legislation be sustained as consistent with the equal protection of the laws? It cannot be said that the exemption made by the ninth section of the statute was of slight consequence, as affecting the gen-

eral public interested in domestic trade and entitled to be protected against combinations formed to control prices for their own benefit; for it cannot be disputed that agricultural products and live stock in Illinois constitute a very large part of the wealth and property of that State.

"We conclude this part of the discussion by saying that to declare that some of the class engaged in domestic trade or commerce shall be deemed criminals if they violate the regulations prescribed by the State for the purpose of protecting the public against illegal combinations formed to destroy competition and to control prices, and that others of the same class shall not be bound to regard those regulations, but may combine their capital, skill or acts to destroy competition and to control prices for their special benefit, is so manifestly a denial of the equal protection of the laws that further or extended argument to establish that position would seem to be unnecessary." (Italics ours).

It is familiar learning that the legislature has a broad power of discretion in classification and the books are full of cases illustrating this principle, especially in upholding the exercise of the police power of the States and establishing their freedom to adjust their remedies to the evils they seek to reach. But however broadly this power of classification be conceived, it has a *limit*. There is still such a thing as arbitrary class legislation, utterly indefensible and peculiarly obnoxious to our institutions. Where classifications have been sustained, this result has been reached because they could not properly be denounced as arbitrary; for arbitrary classification, which puts one citizen under penalty and gives another under the

same conditions immunity without reason, there is no room in our system of government.

However infrequent may be the instances of legislation deserving this condemnation, we have here one of these instances, for it falls directly within the ruling in the *Connolly* case. The language of the proviso in Section 4 of the Lever Act is somewhat amplified, but the provision in substance is identical with that which, in the *Connolly* case, was explicitly condemned. We submit that there is no possible distinction.

Section 4 provides that the section shall not apply to farmers, etc.,

> *"with respect to the farm products produced or raised upon land owned, leased, or cultivated by him."*

The provision in the Illinois statute in the *Connolly* case was that the provision of the Act should not apply to

> *"agricultural products or live stock while in the hands of the producer or raiser."*

Further, it cannot be said that the decisions subsequent to the *Connolly* case with respect to the broad power of classification have in any way impaired its authority. For in the case of *International Harvester Co.* v. *Missouri*, 234 U. S. 199, 215, the Court explicitly said:

> "It is said that the statute as construed by the Supreme Court of the State comes within our ruling in *Connolly* v. *Union Sewer Pipe Co.*, 184 U. S., 540, but we do not think so. *If it did we should, of course, apply that ruling here.*" (Italics ours.)

See, also,

McFarland v. *American Sugar Refining Co.*, 241 U. S. 79, 86.

Probably no two cases could be found more exactly the same, with respect to the present point, than the case at bar and the *Connolly* case. But if any distinction could be made, it would not avail to support the present statute, which presents even a stronger case. In the *Connolly* case, the Court was dealing with an anti-trust act and it could not conceive of any possible ground on which those engaged in selling dry-goods or groceries, or meats, or fuel, or clothing, should, under the statute, be made criminals for combining for the prohibited purposes, while their neighbors who happened to be agriculturists and live stock raisers were left immune. If that was not a case of invalid class legislation, the Court evidently thought there could not be such a case. Here, the fact that the country was at war emphasizes the indefensible and arbitrary character of the proviso. In its first section, the present statute sets forth that it is designed, in order to provide for the support and maintenance of the Army and Navy, to assure an adequate supply and equitable distribution and to facilitate the movement of foods, feeds, etc. Food products are included in the purpose stated, and, manifestly, protection against unreasonable prices of farm products was just as important as protection from unreasonable prices of coal and sugar and groceries or farm machinery. Of what avail would it be to prevent unreasonable prices by butchers and grocers if farmers and live stock raisers were free to charge unreasonable prices?

It has been suggested by the Government in other cases that possibly Congress desired to encourage production by farmers. But it was just as important that there should be production of coal and of sugar, and that industry with respect to all the described necessaries should produce at the maximum. Food could win the war, but it could not win it without fuel, or without the numberless other things which come within the description of articles embraced in the Act. The argument for the encouragement of production by farmers and live stock raisers was just as pertinent, and just as specious and lacking in merit, in the *Cossolly* case. Indeed, there is not a single thing that can be said in favor of the proviso in the present statute which could not have been urged for the proviso in the statute under consideration in the *Cossolly* case. But in that case the Court struck to the heart of the matter when it denounced the proviso for what it *was* and condemned the statute as a pernicious piece of class legislation arbitrarily distinguishing between citizens with respect to the conduct of their business. There has been unquestionably an increasing tendency towards class legislation and the field of legislative discretion is so wide that the Courts are rarely permitted to see what everybody else knows. When, however, a case is presented directly within the decisions—a bald case of arbitrary class legislation putting a penalty upon some and affording others immunity without reason in view of the nature and purpose of the statute—we submit that this perversion of power should receive the condemnation it deserves.

The only distinction that could possibly be made, as we conceive it, for the purpose of taking this

case out of the doctrine of the *Connolly* case, would be, not upon the ground that the proviso was not wholly arbitrary, but that in the *Connolly* case the Court was dealing with the clause of the Fourteenth Amendment as to the "equal protection of the law."

It cannot be maintained, however, that Congress has constitutional authority to enact arbitrary class legislation. Our Constitution opens no such avenue to the exercise of arbitrary power. Granted that Congress has as broad a discretion in classification as have the States, there are still limits, and the *due process* clause of the Fifth Amendment is just as sure a protection to the people against arbitrary class legislation by Congress as the Fourteenth Amendment is with respect to similar action by the States.

This is apparent from the definition of due process in the decisions of the Supreme Court. In *Caldwell* v. *Texas*, 137 U. S. 692, 697, the Court said:

> "Law, in its regular course of administration through courts of justice, is due process, and when secured by the law of the State, the constitutional requisition is satisfied. 2 Kent Comm. 13. And due process is so secured by laws operating on all alike, and not subjecting the individual to the arbitrary exercise of the powers of government, unrestrained by the established principles of private right and distributive justice. *Bank of Columbia* v. *Okely*, 4 Wheat. 235, 244."

In *Giozza* v. *Tiernan*, 148 U. S., 657, 662, it was said:

> "And due process of law within the meaning of the amendment is secured if the laws

operate on all alike, and do not subject the individual to an arbitrary exercise of the powers of government. *Leeper v. Texas*, 139 U. S. 462."

And the view that legislation having an arbitrary classification is not due process is recognized by text-writers of the greatest weight. It is said in McGehee on *"Due Process of Law"*, p. 60:

> "Under the American theory of constitutional government, in which constitutions are a restraint even on the legislature, the idea has had a more fruitful development. Purely arbitrary decrees or enactments of the legislature directed against individuals or classes are held not to be 'the law of the land,' or to conform to 'due process of law.' The conception comes clearly to the front in Mr. Webster's definition of 'law of the land,' which has been already quoted, and it has been frequently repeated by the courts. 'Due process of law within the meaning of the (Fourteenth) Amendment,' said the Federal Supreme Court, 'is secured if the laws operate on all alike, and do not subject the individual to an arbitrary exercise of the powers of government.' 'By the law of the land,' said the Michigan court, 'We understand laws that are general in their operation, and that affect the rights of all alike, and not a special act of the legislature, passed to affect the rights of an individual against his will and in a way in which the same rights of other persons are not affected by existing laws. Such an act, unless expressly authorized by the Constitution, or clearly coming within the general scope of legislative power, would be in conflict with this part of the Constitution, and for that reason, if no other, be void.' 'The clause 'law of the land,'' said Mr. Justice Catron, when a member of the Supreme Court

> of Tennessee, 'means a general and public law, equally binding upon every member of the community.' In a later case, the same court, in order to bring out the constitutionality of legislative classification, preferred to define the phrase as meaning a law 'which embraces all persons who are or may come into like situation and circumstances.' "

Professor Willoughby, in his important work on the Constitution, pp. 873-874, says:

> "The United States is not by the constitution expressly forbidden to deny to anyone the equal protection of the laws, as are the States by the first section of the Fourteenth Amendment. It would seem, however, that the broad interpretation which the prohibition as to 'due process of law' has received is sufficient to cover very many of the acts which, if committed by the States, might be attacked as denying equal protection. Thus it has been repeatedly declared that enactments of a legislature directed against particular individuals or corporations, or classes of such, without any reasonable ground for selecting them out of the general mass of individuals or corporations, amounts to a denial of due process of law so far as their life, liberty or property is affected. One of the requirements of due process of law, as stated by the Supreme Court, is that the laws 'operate on all alike, and do not subject the individual to an arbitrary exercise of the powers of government."

This question, however, is not left to general definitions or the statement of text writers. It has recently received authoritative exposition by the Supreme Court in *Bruskaber* v. *Union Pacific R. R. Co.*, 240 U. S. 1. There, the validity of the Income Tax Act of 1913 was assailed upon the ground that it contained illegal discriminations.

The effort was unsuccessful and the Court found that the statute was within the broad power of Congress in deciding upon the subject and manner of taxation. It was recognized that the Constitution did not conflict with itself by conferring the taxing power on the one hand and virtually withdrawing it through the due process clause on the other hand. But while this was clearly determined, the opinion of the Court defined its attitude with respect to the power of Congress and *pointed out the limitations with respect to classifications that are found in the due process clause of the Fifth Amendment.* After referring to this clause and the fact that it did not operate to invalidate the act under consideration, the Court said (*id.* pp. 24, 25):

> "And no change in the situation here would arise even if it be conceded, as we think it must be, that this doctrine would have no application in a case where although there was a seeming exercise of the taxing power, *the act complained of was so arbitrary* as to constrain to the conclusion that it was not the exertion of taxation but a confiscation of property, that is, a taking of the same in violation of the Fifth Amendment, *or, what is equivalent thereto, was so wanting in basis for classification as to produce such a gross and patent inequality as to inevitably lead to the same conclusion.*" (Italics ours.)

There is, therefore, no room for the argument, that what the Supreme Court condemned in the Illinois statute, in the *Connolly* case, because it produced "a gross and patent inequality" obnoxious to the principles of our institutions, can be sustained in an act of Congress.

Upon this ground Section 4 has been held invalid in a careful opinion by District Judge Anderson in

United States v. *Armstrong*, 265 Fed. 683.

In supporting the contrary view, set forth in *C. A. Weed & Company* v. *Lockwood* in the Circuit Court of Appeals for the Second Circuit (not yet reported), Judge Hough says:

> "If we were in a state of 'official' peace, this statute would in my judgment be unconstitutional under *International Harvester Co.* vs. *Kentucky*, 234 U. S. 216; the condemnation there expressed (especially p. 223) is applicable here word for word. It would also be constitutionally obnoxious because it is a gross piece of class legislation;—incapable of distinction from that condemned in *Connolly* vs. *Union, etc. Co.*, 184 U. S. 540.
>
> "But the statute is begotten by war, and is constitutionally excused (*i. e.* justified) by the war power, which is superior to, and not to be measured by, the police powers of the several states."

We submit that the doctrine of this statement cannot be supported. It recognizes an authority in Congress, to destroy all property rights by penal legislation without reference to any standard the citizen can know and by the most arbitrary discriminations. The broadest conception of the war power involves no such necessity. Congress can regulate without destroying; it can penalize in accordance with some proper standard that its citizens can know; it can avoid an utterly vicious and indefensible discrimination whose only effect can be to bring about confusion and impair the essential stability of the country. Neither in

war nor in peace, can Congress disregard the fundamental requisites of valid legislation by purely arbitrary exactions and limitations which have no reasonable relation to any proper object.

Ex parte Milligan, supra;
Hamilton v. *Kentucky Distilleries Co., supra.*

We submit that there is not the slightest excuse or basis for a proviso of this character, and upon this ground the statute should be held invalid.

SEVENTH.—The Court below erred in its rulings upon questions of evidence.

For reasons already stated, the Court below was in error in refusing to receive evidence of the market value of the articles in question, both at the time of the enactment of the Amendment of October 22, 1919, and at the time the articles were marked for sale, and at the time of the sales described in the indictment.

Assignment of Errors Ninth and Tenth, Transcript, pp. 148-153.

And taking the theory on which the case was tried, the Court erred in excluding the evidence of the actual cost of various articles which went into "transfer lots" and which were brought together and given an average cost price.

Assignment of Errors, Thirteenth, *id.*, pp. 157-158.

The Court also erred in rejecting testimony bearing upon the selling price of hats.

Assignment of Errors Eighth, *id.*, pp. 147-148.

The Court erred in excluding evidence relating to net profits, good faith, and the good reputation of Weed's, Inc.

Assignment of Errors, Eleventh, Twelfth and Fourteenth, *id.*, pp. 153-157, 158.

EIGHTH.—The Court below erred in its charge to the jury.

Assignment of Errors, Sixteenth, *id.*, pp 159-160.

The full charge appears in the transcript (*id.*, pp. 119-125). The theory upon which the Court submitted the case to the jury has already been fully considered in the points we have discussed.

The Court also erred in permitting the Assistant United States Attorney to make an inflammatory appeal to the jury, and in the Court's interruption of counsel for the plaintiffs in error as he was summing up.

Assignment of Errors, Seventeenth and Eighteenth, *id.*, p. 160.

Upon the grounds which have been argued, it is also submitted that the demurrer to the indictment

should have been sustained, or the motion to dismiss or to quash allowed, or that the motion in arrest of judgment should have been granted.

The judgment of the District Court should be reversed and the indictment dismissed.

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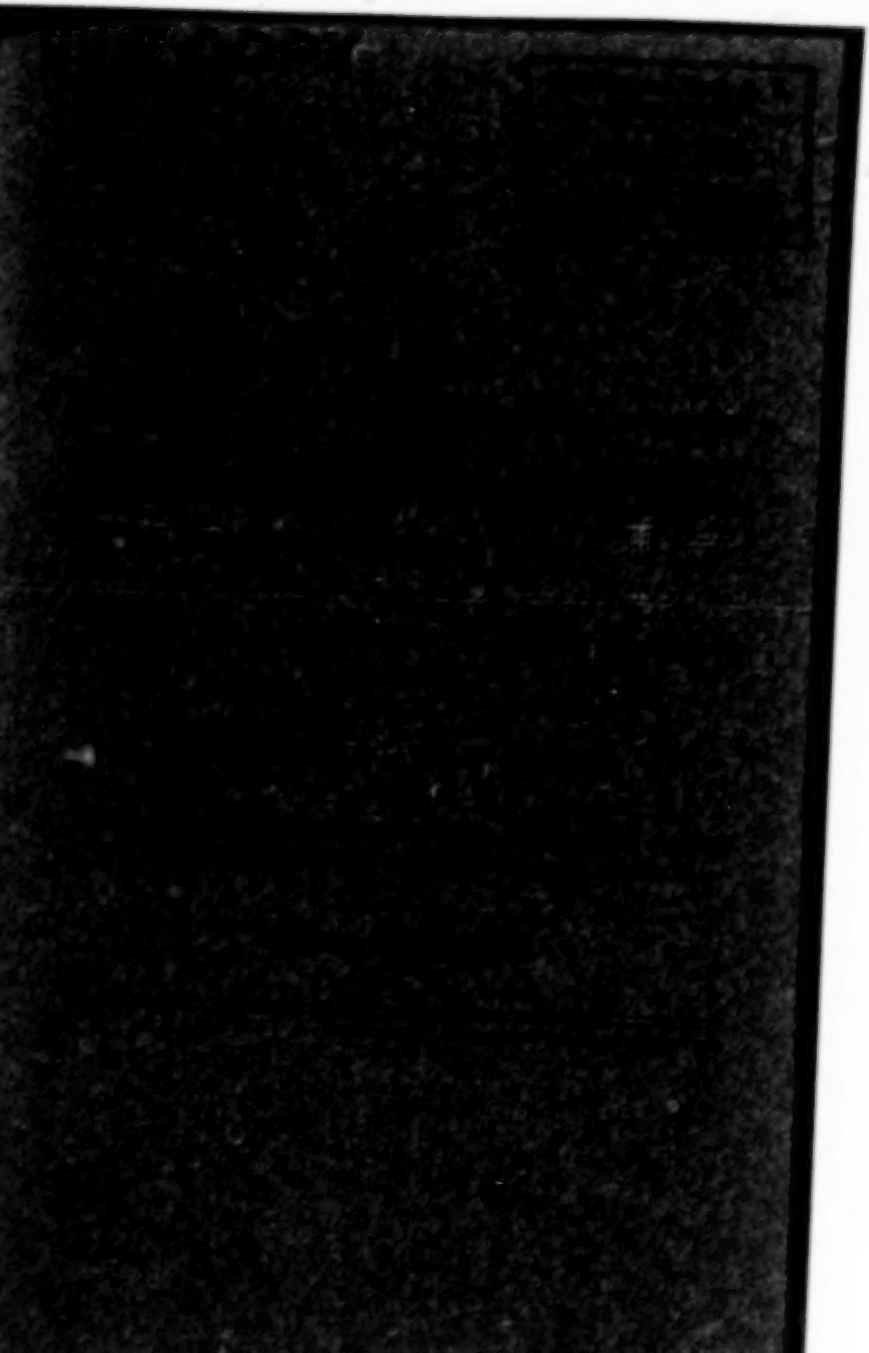

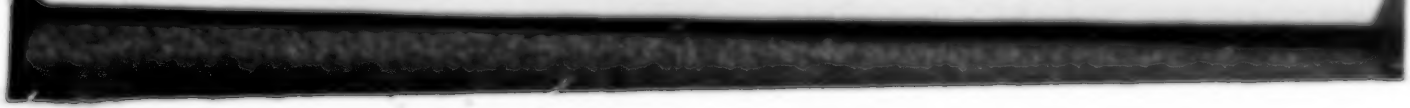

In the Supreme Court of the United States.

OCTOBER TERM, 1920.

WEEDS, INC., AND GURDON H. SMITH,
Plaintiffs in Error,
v.
THE UNITED STATES OF AMERICA.
} No. 558.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF NEW YORK.

MOTION TO ADVANCE.

Comes now the Solicitor General and, on behalf of the United States and opposing counsel, moves the court that this case be advanced for hearing.

The question involved is the constitutionality of the Lever Act of August 10, 1917 (40 Stat., c. 53, p. 276), as amended by the act of October 22, 1919 (41 Stat., 1st session, c. 80, p. 297). The same questions are involved in this case as in the case of *Harry B. Tedrow* v. *A. T. Lewis & Son Dry Goods Company*, No. 357, which has been advanced and set for hearing on October 11, 1920. The same counsel who will appear for the plaintiffs in error in this case will appear for the appellee in that case.

It is therefore moved that this case be advanced and set for hearing with the case of *Tedrow* v. *Lewis* on October 11, next.

Respectfully,

WILLIAM L. FRIERSON,
Solicitor General.

OCTOBER, 1920.

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In the Supreme Court of the United States.

OCTOBER TERM, 1920.

WEEDS, INC., AND GURDON H. SMITH, PLAINTIFFS IN ERROR, *v.* THE UNITED STATES OF AMERICA. } No. 558.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF NEW YORK.

BRIEF FOR THE UNITED STATES.

The writ of error in this case seeks a review of a judgment convicting the plaintiffs in error of certain violations of the Lever Act of August 10, 1917 (40 Stat., c. 53, p. 276), as amended by the Act of October 22, 1919 (41 Stat., 1st session, c. 80, p. 297), making it unlawful, among other things, "to make any unjust or unreasonable rate or charge in handling or dealing in or with any necessaries," and "to conspire, combine, agree, or arrange with any other person * * * to exact excessive prices for any necessaries; or to aid or abet the doing of any act made unlawful by this section."

STATUTE INVOLVED.

The full text of the sections of the statutes which are involved in this case has been so often given in briefs filed in other cases which will be considered with this case that it need not now be repeated. It is sufficient to say that the original Lever Act made it unlawful to make an unjust or unreasonable rate or charge in handling or dealing in certain necessaries, including foods, feeds, fuel, and other articles, but not including wearing apparel. That Act did not provide for criminal prosecutions for the mere making of such unlawful rates or charges. Such rates or charges were condemned, but were to be regulated through a system of licenses, and the prosecution of those who handled the necessaries in question contrary to the terms of the licenses was authorized. The Act of October 22, 1919, however, included wearing apparel in the list of necessaries, for the handling of or dealing in which unjust and unreasonable rates and charges were condemned, and also made a violation of the inhibition against such rates and charges a criminal offense.

THE INDICTMENT.

The indictment was against Weeds, Inc., a corporation conducting a general merchandise store in Binghamton, N. Y., and Charles A. Weed, its president, and Gurdon H. Smith, its general manager.

The indictment contained eight counts, but the sixth count was dismissed.

The first count charges a conspiracy "to exact and to aid and abet in exacting excessive prices for certain necessaries, to wit, wearing apparel." The specific charge is that this conspiracy was entered into about November 1, 1919, and that between that date and April 1, 1920, in furtherance of the conspiracy and for the purpose of effecting its object, the defendants placed upon sale in the store of the defendant corporation various articles of clothing "at prices and figures greatly in advance of the actual cost price thereof." Then followed a list of 26 different lots of wearing apparel, together with the cost price and the price at which they were placed on sale. The percentage by which the cost price was charged to have been advanced varies very considerably. An examination of the figures set out in the indictment shows that, with respect to 7 of the 26 lots specified, the goods were placed on sale at an advance of from 110 per cent to 194 per cent of the cost price, the average being 147 plus per cent. With respect to 12 of the lots the increase ranged from 71 per cent to 100 per cent, the average being 84 plus per cent. With respect to 6 of the lots the percentage of increase ranged from 60 to 66 per cent, the average being nearly 64 per cent. Only one lot was advanced lesss than 60 per cent, and that was advanced 46 per cent. The average for the 26 lots was about 95 per cent.

Each of the remaining counts, omitting the sixth, which was dismissed, charges the sale of a suit of

clothes and the making of an unjust or unreasonable rate or charge for handling or dealing in the same. These sales were made on January 8, 9, 21, and 29, and March 3, respectively. The specific charges were, in the second count, that a suit of clothes costing $20 was sold at $40, making the rate or charge 100 per cent of cost price; in the third count, a suit costing $12.10 was sold at $40, making the rate or charge 230 per cent of the cost price; in the fourth count, a suit costing $23.50 was sold at $45 making the rate or charge 91 per cent; in the fifth count, a suit costing $17.82 was sold for $45.50, a rate or charge of 155 per cent; in the seventh count a suit costing $11.78 was sold for $29.50, making a rate or charge of 150 per cent; and in the eighth count a suit costing $32.25 was sold for $60, making a rate of 86 per cent. (Rec., pp. 3–10.)

PROCEEDINGS IN THE COURT BELOW.

A demurrer challenging the constitutionality of the Act was overruled. (Rec., pp. 12–24.) The defendant, Charles A. Weed, was not tried. As to the other two defendants, the jury returned a verdict of guilty and the court rendered judgment on this verdict. (Rec., pp. 10–11.)

THE CASE AS PRESENTED TO THE JURY.

On the trial the cost price and the selling price of the various articles mentioned in the indictment were, with perhaps a few slight variations, shown to have been as charged in the indictment.

With respect to the first count, charging a conspiracy, it appeared that up to January 1, 1920, the

business thereafter owned and conducted by Weeds Inc., was owned and conducted by Charles A. Weed, and that defendant, Gurdon H. Smith, was the general manager of the business. About January 1, 1920, Mr. Weed incorporated this business, and thereafter it continued to be conducted, except for the act of incorporation, as it had been conducted before and by the same persons and employees. It was shown that the various lots of goods specified in the first count were, under the authority and by the direction of plaintiff in error, Gurdon H. Smith, as general manager of the business, marked for sale at the prices mentioned in the first count and that the clerks in the store were directed to sell at these prices and were not authorized to sell at lower prices without especial authority to do so.

It was also shown that the sales specified in the remaining counts were made as charged. It thus appeared that these suits of clothes were sold at an advance ranging from 86 per cent to 230 per cent of the cost price.

An effort was made by the plaintiffs in error to explain their system of making retail prices. One witness said that they had a well-defined method of fixing charges and that the selling price is based, to start with, on the average of the last season's cost of operating. He then said:

> Taking this as a basis the merchandise as received is marked to show us what we would consider a fair return. For instance, based

> on a percentage of 27½ or 28 per cent we would mark our merchandise from 35 to 37 per cent. This would take care of losses where we take in stuff being—having to be sold at greatly reduced prices, some of it below cost; returned merchandise, which we have to make good to the customer, and which we do make good to the customer in every instance. We have no absolute way of determining what this is going to be; the only thing we can do is to get as near as possible the average on it because it relates to the future that is entirely speculative. There is no way that we can determine in advance what the result of a year's business will be. (Rec., p. 83.)

Continuing the same witness said:

> There are instances where the margin is lower and instances when they are higher. The figures I am using are average percentages on seasonable merchandise.
>
> In fixing the cost of doing business at 27 to 32 per cent I include the total expenses of the store; interest on our investment, rental, salaries of employees, depreciation. It is the entire expenses of the business, but it does not include interest on the investment. The corporation has only been in existence since January 1st. It includes every expense known to the directors. (Rec., p. 83.)

The witness's effort to explain this system by applying it to the transaction alleged in count 1 of the indictment is as follows:

> In count 1, 22d item, we make a charge of $60 for a suit of clothes. The cost price is

fixed at $30.50 actual cost. The mark-up price of that wearing apparel is about one hundred per cent on the cost, but our mark-up is all based on the retail and not on the cost, because all percentages are figured—I call that a mark-up. Based on 28 per cent for a suit of clothes sold for $60 our expense on that would be $16.80, based on the selling price. I am familiar with the custom and practice that exists in the trade other than in our own business. As to whether the percentage of expense is charged against the selling price or cost price, in every instance that I know in our line of business it is charged against the sales price, the actual turnover. I don't know in our particular line of business of any that charge it up on the cost price, although they may do it. The percentages that I have given of 27 or 28 to 31 or 32 per cent are percentages on the selling price of the article and not on the cost. Reduced to concrete figures, 30 per cent on the selling price of an article would be equivalent in rough figures to 43 to 45 per cent on the cost; 33⅓ per cent is exactly 50. (Rec., pp. 83–84.)

The same witness testified that the expenses of the business for the year 1919 were approximately $90,000 (Rec., p. 84) and that the total sales for the year amounted to $330,000 (Rec., p. 79). Explaining again the application of this system, the witness said:

> The article in the second count is from my department. The cost price is $20; that was

actually sold for $40, so that the mark-up was $20; 45 per cent of $20 is $9. Adding the $9 to the $20 gives the entire cost of the article according to the figures; that leaves a net profit of $11, which is 55 per cent of the purchase price. The net profit of handling that article is 55 per cent. (Rec., p. 91.)

Continuing the witness said:

On that one article the store got 55 per cent net profit. The next count, lot No. 20040, man's suit, is the article mentioned in this invoice. That is the suit mentioned in the 4th item in exhibit marked "117" for identification, shown me. It cost the store $21.25 when it was purchased. It was actually sold for $40. The gross mark-up is $18.75, 45 per cent of the purchase price is the overhead and carrying charge as I figure it. The net profit is 42 per cent plus based on the cost price and not based on the retail price. The next count in the indictment, cost price is $23.50. The article sold for $45. That is a suit in my department. The net profit on that article is 46 per cent. Count five is another article in my department, suit lot 22050. Average cost price $17.82. We actually sold that garment for $44.50. Subtract $17.82 from $44.50 it gives $26.72 mark-up. Add 45 per cent to the cost price, I make it 105 per cent, based on the cost. In dollars and cents the profit is $18.67. The profit was more than the cost price of the article. Count 7, I believe, is one of mine. The average cost price on that is $11.78. That garment was sold for $29.50.

> The gross profit is $17.72. * * * The last count in the indictment is another item in my department. Cost price $32.25 and it sold for $60. The gross profit is $27.75. The net profit on that item is 41 per cent, but in dollars and cents approximately $13.24. I said I hadn't those figures, but approximately we turn our merchandise over two to three times a season. (Rec., p. 92.)

And again:

> On this article that we make 105 per cent net profit, assuming that we turned that two and a half times a year, we would make 250 per cent on our money, that year on that particular thing. The people purchasing that article would be paying 250 per cent net profit on that article. (Rec., p. 92.)

The above quotations are made not because they convey any sensible idea of a fixed and definite plan of making prices, but because they furnish the only explanation which the defendants were able to offer.

About all that can be gleaned from the testimony is that, in this store, cost price bore but little relation to the fixing of selling prices. The only thing approaching a system is that plaintiffs in error regarded from 27 per cent to 32 per cent of whatever they saw fit to fix as a selling price as necessary to cover the expenses of the business and the remainder, after deducting cost price, as net profit. But, in fixing selling prices, they apparently recognized no standard and followed no rule. They are charged with selling two suits at $40 each. One cost $20 and the other

only $12.10. Another which cost less—$17.80—was sold at the higher price of $45.50.

Apparently, nothing else appearing, counsel have not the hardihood to insist that such net profits as are above indicated do not obviously include an unreasonable charge for handling or dealing in necessaries. The real defense seems to have been predicated on a claim that, after these goods had been purchased in 1919, the prices to the retailer of similar goods had advanced until to replace these goods would have cost a very much larger amount than the original cost. The contention is, that, through these advances in the wholesale market, the value of the goods which the retailer had in stock had been much enhanced and that the retailer had a property right in this increase of value. It is insisted, therefore, that, in order to determine whether a particular charge is reasonable or not, it must be ascertained whether the charge is unreasonably in excess of the *replacement value* rather than of the *original cost.* In the alternative, it is insisted that, if this contention is not sound in toto, the retailer is entitled to take, as a basis for his charges, the actual wholesale market price of similar goods on October 22, 1919, when the Act was passed, and is not guilty of making an unreasonable charge unless the charge is unreasonably in excess of this price.

For the purpose of making this contention, evidence was offered tending to establish the value or market price of the goods in question, first, on October 22, 1919, and, second, at the dates on which they were

sold. The District Court excluded this evidence and, aside from the constitutional questions involved, this ruling is the ground upon which a reversal is now sought. The record does not disclose what this evidence would have shown, if admitted.

BRIEF.

The constitutional questions involved have been fully discussed in briefs filed on behalf of the United States in other cases which are to be heard and considered with this case. Those briefs are now referred to, and it is not deemed necessary to repeat the argument there made. This brief will, therefore, be confined to the effort to meet some of the arguments advanced by counsel in this case which may not be fully covered by what has already been said.

I.

The Act of October 22, 1919, both when passed and when enforced by the judgment in this case, was a valid exercise of the war power.

The Government's views on this question are very fully set out in its brief in the case of *United States* v. *L. Cohen Grocery Company*, No. 324. It may be helpful, however, to now make specific reply to some of the contentions contained in the brief of counsel in this case. There is but little, if any, controversy as to the general rules of law which must be applied. The only difficulty is with their application to a particular state of facts.

No one will contend that the war powers of Congress are unlimited. The legislation which may be

enacted under this power must, of course, be such legislation as is necessary and proper for carrying the power into execution. The legislation, in other words, must bear some reasonable relation to the conduct of a war. This does not mean, however, that whether particular legislation is proper and valid can be made to depend upon whether the courts think it is necessary, under all the circumstances, to the success of the war. If it deals with a subject which is so related to carrying on the war or to maintaining such a state of affairs as will make the successful conduct of the war possible, the power in Congress exists. If the power exists, the extent to which it shall be used is committed to the discretion of Congress and is not subject to review by the courts. In determining whether a particular Act bears any reasonable relation to a purpose which Congress is empowered to accomplish, the courts always proceed with great caution. The reasons which influence Congress may not seem to individual judges to be sound. In their opinion a particular Act may be calculated to have a bad instead of a good effect upon the purpose in view, but if it is calculated to affect that purpose in any reasonable way, whether for good or evil, it is so related as to be within the power of Congress, and the opinion of Congress as to its necessity must prevail.

In this case it is proper for the court to inquire whether the general subject of regulating and controlling the distribution and prices of wearing apparel. during a state of war. has any proper or reason-

able relation to the exercise by Congress of its war powers. In civilized life and in this climate wearing apparel is just as essential to human existence as food. Moreover, armies can not be raised and supported unless the Government may obtain large quantities of wearing apparel. The magnitude of the Government's requirements, therefore, upon the producers of wearing apparel is such that a scarcity in the markets to which the people of the country must resort is almost inevitable. These people must have the means of subsistence or they can not effectively render the service which they must render in order that the Government may support its armies. No reason can be advanced in support of the Government's right to control the distribution and prices, during a war, of food which do not apply equally to the distribution and prices of necessary clothing. In other words, the right to control the necessaries of life is an incident to the exercise of the war powers of the Government. The control and regulation of necessaries, therefore, has a direct relation to the proper conduct of a war. With this fact established, the inquiry by the courts into the necessity for such control or regulation must end. Its relation to the purpose of the war being established, the extent to which the power should or shall be exercised becomes purely a question of policy the determination of which is not committed by the Constitution to the courts. The extent to which the necessity for legislation of this kind exists will doubtless vary with the progress and prospects of a

war. It is a matter about which individuals will differ. Necessarily, therefore, as the prospects of peace become brighter and the chances of a resumption of actual hostilities slighter, Congress must determine to what extent, if any, it will be safe to abandon the measures deemed necessary when the war was more flagrant. It must always be remembered, however, that until peace is finally established the country is legally at war and the responsibility rests upon Congress to keep the Nation in such a state of preparedness as to meet any emergency that may arise until war is finally terminated. As long as such a state of war exists, Congress may rightfully exert its war powers and, provided the measures which it adopts have any reasonable relation to the successful conduct of a war, is the final judge of the extent to which those powers shall be exerted.

That on October 22, 1919, when this Act was passed, Congress could rightfully exert its war powers was settled and determined when this court held that the Prohibition Act, passed six days later, was a lawful exertion of the war powers of Congress. The cases of *Hamilton* v. *Kentucky Distilleries and Warehouse Co.* (251 U. S. 146), and *Ruppert* v. *Caffey* (251 U. S. 264), upholding the Volstead Act, furnish a complete and conclusive answer to the contentions now made. It is true that those cases recognize that, in order for war measures, dealing with subjects, in times of peace beyond the power of Congress, to be valid there must be not only a technical state of war but there must be some relation between the measures adopted and the

conduct of a war. The court, however, rejected the idea that it could properly review the judgment of Congress as to whether the status of the war at a particular time made it necessary to adopt any measure bearing a relation to the purpose of the war. These considerations were strongly pressed upon the court. But, adhering to its well-established rule, the court went no further with the inquiry than to reach the conclusion that the prohibition of the manufacture and sale of intoxicating liquors, or the use of food products in their manufacture, does bear a relation to the successful conduct of a war. It refused to consider whether the prospects of a resumption of hostilities were so slight that such a prohibition was no longer necessary. It recognized that matter as falling exclusively within the jurisdiction of Congress. It so held although the very Act under consideration had been vetoed by the President, upon the ground that, in his judgment, the war had reached such a stage that so stringent a measure was no longer necessary. The legislative policy of the Nation is declared by the affirmative vote of Congress and the approval of the President, or, in the event of his disapproval, by the passage of an Act over his veto by the majority required by the Constitution. It may be that every Justice on the bench, as an individual, shared the opinion of the President that the legislation was no longer necessary. But, sitting as a court, they gave heed on that matter only to the legislative judgment voiced in a constitutional way. No consideration

tending to show that the military purposes of the war had been accomplished, which is now urged against the present Act, was omitted from those urged against the Prohibition Act, as is clearly shown by the dissenting opinion of Mr. Justice McReynolds in the *Ruppert* case.

The latter case also furnishes an answer to the contention now made that the extension of this law so as to include wearing apparel is void because, while hostilities were in progress, Congress did not see fit to apply to wearing apparel the same rule it applied to food and fuel. In the *Ruppert* case, the Prohibition Act, which was passed in 1918, before the armistice, had permitted the manufacture and sale of beer containing as much as 2¾ per cent of alcohol. A year later, Congress saw fit to prohibit the manufacture or sale of any beer which contained as much as one-half of 1 per cent of alcohol. This presented precisely the same question now made, and the court held that the later Act, as well as the earlier one, was within the power of Congress. Obviously, the fact that during the early stages of the war Congress did not deem it necessary to exert all the power which it might rightfully exert is no obstacle in the way of its exerting that power at later stages of the war if, in its judgment, necessary. Indeed, experience with the laws actually enacted may have impressed upon Congress the necessity of extending them. At any rate, if, in October, 1919, it was competent for Congress, as a war measure, to prohibit the manufacture of one-half per cent beer, which had been permitted throughout the

period of actual hostilities, it was equally competent for that body, at the same time, to exert its power over the distribution of necessaries consisting of wearing apparel, even though it had not previously found it necessary to do this.

The considerations which uphold the Act when passed in October, 1919, equally uphold its enforcement at the time these offenses were committed in January, February, and March, 1920. True, some progress had been made in the process of returning the country to a peace basis. The probability of a resumption of hostilities, however, was scarcely either more or less slight than it was in 1919. The proposed treaty of peace was still the subject of controversy, and apparently no nearer a settlement. The difference between conditions in October, 1919, and March, 1920, was one only of degree. The conditions were essentially the same.

In the brief filed for the appellee in *Tedrow* v. *Lewis*, No. 357, which is referred to and adopted by counsel in this case, mention is made of the fact that in May, 1920, Congress passed a joint resolution, the effect of which was to repeal all these war measures, which resolution was vetoed by the President and not passed over his veto. It is said, however, that the passage of this resolution was an expression of opinion by Congress that this legislation was no longer necessary for war purposes. There are two answers to this suggestion. In the first place, it was not passed until some months after the commission of the offenses in this case. In the second place, the

legislative power of the Nation is vested in Congress and the President. The legislative will is expressed by their joint action, or, where they are in conflict, by the subsequent passage of a measure over the President's veto. Unless a measure is adopted in one of the ways in which it can thus become the law of the land, no vote of Congress can be said to express the legislative will of the Nation. In the *Prohibition* case, where the President and Congress had disagreed, this court very properly gave no heed to the President's views and listened only to the legislative voice as finally expressed in the constitutional way. So, with respect to this resolution, having failed to secure the President's approval, it could not be treated as an expression of the legislative will of the Nation unless subsequently passed by the constitutional majority. This was not done, and the result was that, by the failure to take the proposed action, the legislative judgment was that this measure was still necessary as a war measure.

It is not necessary in this case to consider to what extent, if any, Congress may exert its war powers after a declaration of peace in order to correct the evils growing directly out of the war. We have not yet reached the time when that question is pertinent. This Act by its own terms will expire upon such a declaration of peace. Counsel say, at page 26 of their brief:

> It is not questioned but that war activities must be wound up and that proper time must be allowed for that purpose.

Nothing more than this is necessary to sustain the laws now under consideration. They must be sustained as against this objection unless it is within the province of the court, and not of Congress, to determine when, during a state of war, measures previously adopted and bearing a relation to the conduct of the war may safely be relaxed.

So far as this particular question is concerned, the entire argument for the plaintiffs in error is based on the fallacy that the courts, in considering war legislation deemed by Congress necessary, may properly consider all the circumstances and determine what measures, within the power of Congress, it is necessary or proper to enact. Thus, it is said, at page 20 of the brief:

> It is plain that a war may present a great variety of exigencies. There might be a war with Haiti which would involve only a few naval forces and present no basis whatever for legislation regulating the internal concerns of the American people.

But suppose war should be declared on Haiti? Who is to determine whether only a few naval forces will be required, or whether a large navy and an army will be necessary? Suppose Congress and the President should be of opinion that an army of a half million would be necessary and should proceed to enforce a draft law to raise such an army. Would this court, for one moment, make the validity of the draft law depend upon its opinion as to whether so many

soldiers would be needed? Suppose when the second draft law to raise an army to fight Germany was passed some one had contested that law upon the ground that all the soldiers had been secured under the first draft law that could properly be used in the war, and that therefore another draft was unnecessary. How much consideration would this court have given that contention? Could any court have properly heard evidence and proceeded to determine how large an army was necessary? Suppose, again, war should be declared on Haiti, and suppose the casus belli was such that Congress felt sure that the waging of war against Haiti would immediately involve us with some of the great powers of the world. Would it not be the duty of Congress to take such measures as would be necessary to successfully conduct the war in view of all that seemed to it imminent? If, under such conditions, it should deem it necessary to exercise some measure of control over the necessaries of life, its power to do so could not be successfully questioned. When war is declared, the individual view of every judge in the land may be that the measures taken by Congress are out of all proportion to the threatened danger or to the actual necessities of the case. But, when these judges are sitting as courts, their individual views as to the wisdom or necessity of these measures can have no weight against the constitutionally expressed will of Congress.

II.

There is no unconstitutional taking of property under the act of October 22, 1919.

It is insisted that this Act, as construed by the court below, takes the property of the plaintiffs in error by denying them the right to contract for its sale at the fair market value at the time of sale. This is predicated upon the ruling that the fair and reasonable rate or charge that may be made for handling or dealing in necessaries is the amount charged in excess of the cost price and not in excess of the market value or replacement price. In other words, it is claimed that, if one has purchased property for sale, and if at the time of sale the market value of such property has increased, so that it can not be replaced except at a larger cost, the prevailing market price measures the extent of his property rights, and that to forbid him to sell at the enhanced price plus a reasonable charge for handling is to take his property. The answer to this is that this statute does not take property in any sense. It is merely an exercise of police power as an incident to the exertion by Congress of its war power. This question is fully discussed in the Government's brief in the case of *Oglesby Grocery Co.* v. *United States*, No. 457, which is referred to. The Act treats the labor and capital employed in handling or dealing in necessaries as employed in a business impressed with a vital public interest, and therefore subject to governmental regulation. It recognizes the necessity of conserving

necessaries and securing their fair distribution during a period of war. This requires handling in various ways. The language employed by Congress is comprehensive and includes all handling or dealing, and is evidently intended to apply to every service rendered by capital or labor in bringing necessaries from the producer to the consumer. It may be an open question, as suggested in the *Oglesby Grocery Company* brief, whether the terms used include mere producers, but they undoubtedly include everything that is done in the way of handling or dealing in the commodities in question. If it be assumed that they do not include one who simply produces, as a farmer or manufacturer, they still cover a very wide field. In the case of coal, for instance, a company engaged in mining does not produce coal. It simply employs capital and labor to remove it from the ground. It thus handles the coal as it is found in its natural state. Those who buy and sell it after it is mined deal in it. In the case of all commodities, those who handle them by transporting them, selling them as brokers, or buying and selling them as dealers, are within the terms of the Act. In limiting the charges that each handler or dealer may make, the Government does not take any of his property. It does not interfere with any right to contract guaranteed him by the Constitution. It merely prohibits him from making contracts which are detrimental to the public and to the Government itself during a period of war. It rests upon the same principle as the usury laws of the various States, which are valid exertions of the

police power even in times of peace. These same objections were urged against the Prohibition Act. It was said that distillers had lawfully produced and then owned large stocks of liquors, and that, by prohibiting the sale of such liquors, their property had been taken without due process of law and without compensation. The insistence, however, was rejected by the Court upon the ground that the provisions of the Constitution invoked had no application to the rightful exertion of the police powers of Government. *Hamilton* v. *Kentucky Distilleries & Warehouse Co.* (251 U. S. 146).

III.

The statute in question is not invalid on account of uncertainty.

In this case, as in the other cases before the court, it is insisted that the statute making it a criminal offense to conspire to exact excessive prices and to make unjust and unreasonable charges is too vague and uncertain in its definition of the offense to be valid and enforceable. In addition to what has been said in the Government's brief in the *Oglesby Grocery Company case*, No. 457, special attention is again called to the language of Judge Sibley in that case, as follows (264 Fed., 691, 695):

> Evidently standards may exist in law or fact to which the Legislature may refer, and the existence of them is a matter of importance. It must be noted that the Act of August 10, 1917, is dealing with necessaries, articles that,

by reason of their necessity, are in common use, dealt in continuously and everywhere. The range of prices and profits in them in time of peace is well established and well understood. The changes that occur in such prices and the causes therefor are well known. The dealer is not in a novel venture. The descriptive words of the act are thus defined by Webster:

Unjust, as "contrary to justice and right; wrongful." Excessive, as "exceeding what is usual and proper." Unreasonable, as "beyond the limits of reason or moderation; immoderate; exorbitant." Immoderate, in turn, means "exceeding just, usual, or suitable bounds." Exorbitant means "deviating from the normal or customary course; going beyond the rule or established limits of right or propriety."

The words used by Congress in reference to a well-established course of business fairly indicate the usual and established scale of charges and prices in peace times as a basis, coupled with some flexibility in view of changing conditions. The statute may be construed to forbid, in time of war, any departure from the usual and established scale of charges and prices in time of peace, which is not justified by some special circumstance of the commodity or dealer. Evidently increased costs of production and transportation would justify a corresponding increase in price, and necessarily increased expenses in the conduct of business would justify an increased charge for handling; but the exist-

> ence and sufficiency of the justification is left in each case to the courts. This does not differ, in substance, from the situation arising under the Georgia homicide statutes which forbid generally the killing of a human being, but admit of justifications and mitigations which are measured finally by the opinion of juries. The dealer knows what was, in time of peace, usual and customary. Within that limit he is safe. He judges of the justification for departure from it at his own risk. That the usual and customary may serve as defining a crime was ruled in *Omaechevarria* v. *Idaho* (246 U. S. 343).

Persons entering into contracts which may have the effect of restraining in any degree commerce must judge for themselves whether the resulting restraint will be undue restraint. If they judge wrongly, they may be convicted of a violation of the Antitrust Law. So, a merchant dealing in necessaries knows the range of profits which are usually and ordinarily included in the selling prices of goods, and therefore knows what are ordinarily reasonable prices. If conditions exist which will justify a departure from the prices and profits which have theretofore been customary and therefore reasonable, a merchant must judge for himself as to the extent to which the new conditions justify a departure. The standard is what is usual and customary under ordinary conditions. This furnishes a standard by which, with a fair degree of certainty, the increases justified by changed conditions may be measured. In apply-

ing this standard, he takes no more risk than when one entering into a contract must determine for himself whether the result will be an undue restraint of trade. The definition of the offense is just as definite and certain in the one case as in the other.

Commenting on the case of *Omaechevarria* v. *Idaho* (246 U. S. 343), counsel, page 68 of their brief, say:

> Objection was taken to the statute because of the reference to the prior occupation as a "usual" one. But this reference to what was customary did not go beyond the bounds of a permissible generalization and referred to a standard well understood by every one familiar with the cattle ranges.

So, in this case, by fair interpretation, the statute fixes as the standard what is usual and customary under similar circumstances, and this referred to what was well understood by every one familiar with the mercantile business. In the language of counsel, therefore, it "did not go beyond the bounds of a permissible generalization."

IV.

The statute is not subject to constitutional objection upon the ground of an arbitrary classification.

The Government's views on this question have been stated at length in its brief in the case of *Tedrow* v. *Lewis*, No. 357, and but little need be added to what is there said.

Counsel have referred to the suggestion made in the Government's brief in the *Tedrow* case that section 4

of the statute may not apply to a manufacturer or mere producer, and have asserted that the Department of Justice has, in some cases, in the lower courts, prosecuted manufacturers. If the latter assertion is correct, it can have no bearing on this case. The question now is what the Act means and not whether the Department of Justice has always been consistent in the construction placed upon it. Moreover, it is said in the Government's brief in the *Tedrow* case that, under any construction of the Act, a manufacturer may be guilty of making unreasonable rates or charges for handling his products after the process of manufacture has been completed. Again, a manufacturer may subject himself to the rules applied to dealers by establishing places of business and holding his products for sale away from the place of manufacture and in the manner in which they are sold by merchants.

There are articles in the list of necessaries where no one having any connection with them at any stage can be said to be a producer in the sense in which that term is used above. Thus, there is no doubt that no person having any part in bringing coal from the earth where it is found to the consumer can be said to be a producer. The coal has been produced by nature and needs only to be handled. The miner is therefore engaged in handling it and is clearly within the terms of the Act.

At any rate, a classification which separates producers from handlers and dealers would not be arbitrary. If this is what the Act does, the proviso simply puts the farmer in the same class with other

producers. But if the manufacturer is held to be subject to the Act with respect to his charges for manufacturing, there are, as pointed out in the brief in the *Tedrow* case, sufficient differences between his business and that of the farmer to justify the classification. In some lines, the manufacturer handles the products of the farm by putting them in the shape in which the consumer requires them.

For these and the reasons urged in the Government's brief in the case of *Tedrow* v. *Lewis*, it is respectfully submitted that the proviso that the provisions of the Act shall not apply to farmers with respect to their own products is not an arbitrary classification.

V.

In declining to treat replacement value as the standard, the court below properly construed the statute.

The Government's views on this question have also been presented in the *Oglesby Grocery Company* case, No. 457.

The occasion for the passage of this statute was that the war, with its demands upon the manhood and resources of the country, necessarily weakened competition and tended to diminish the supply of available necessaries. The prime object of the Act was to lay a restraining hand upon those whose avarice might lead them to demand for services rendered by themselves or their capital all that they could extort under the stress of war conditions. To accomplish this purpose, labor and capital are treated as rendering a service to the public in distributing

necessaries, and the amount which may be demanded for this service is limited. True, this particular section of the Act does not use the words "profit" or "prices." Instead, more comprehensive language is used. This language, however, has a necessary relation to both profits and prices. The price which a merchant charges includes, of course, his profit. When he purchases at one price and sells at another, the latter price necessarily includes his profit. This profit is only another name for the charge which he makes for the use of his capital and his labor. The difference between cost and selling price, therefore, is the charge which he has made for handling or dealing in the commodity. If there has been no advance in the market price, the charge he thus makes is, of course, the difference between cost price and selling price. If the market price has advanced and his competitors see fit to take advantage of the advance, he may sell at a higher price than he could have obtained if there had been no advance in the market. If he does so, however, the difference between the cost price and this higher selling price still is the measure of compensation which he has received for the use of his capital and labor. Whether, therefore, the profit he reaps is merely the usual difference between cost price and selling price, or whether it includes an amount which he has been able to add on account of an advancing market, it nevertheless represents in exactly the same sense the rate or charge for handling or dealing in necessaries which the statute says shall be reasonable. The

expense of conducting the business and the cost of handling the goods is exactly the same whether the market has remained stationary or has advanced. What is a reasonable charge for the service rendered in the one case is a reasonable charge in the other. The statute prohibits an unreasonable charge in either case, just as the statutes of the various States prohibit an unreasonable charge for the use of money.

VI.

Rulings of the court below.

The assignments of error with respect to the exclusion of testimony and the charge of the court are practically all based on the contention that replacement values should be taken as the basis for fixing reasonable charges. What has already been said is therefore an answer to these assignments.

VII.

Verdict of the jury amply supported by the evidence.

It must not be understood that the Government insists that a case can be made out under this statute by proving, without more, the cost price and the selling price of commodities. The jury, under the statute, must determine what are reasonable charges and rates, but their determination of this question must be based upon competent evidence and not upon their individual judgment uncontrolled by evidence. There must be evidence from which the jury, applying common sense, may fairly determine that a particular rate is unreasonable.

An indictment merely charging the cost price and the selling price without the additional charge that these involved an unreasonable rate would not state an offense. So, there must be some evidence to sustain this necessary averment of the indictment. In some cases the price may be so obviously extortionate as to require but little evidence. The reasonableness of a charge for service, of course, depends very largely upon what it costs to render that service.

In this case the evidence shows that the difference between cost price and selling price ranged from around 70 per cent to as high as 230 per cent. Evidence was offered as to the expense of doing business, and the extreme claim made was that 45 per cent would cover all expenses and all contingencies that could be reasonably anticipated, and that all above this amount would be net profit. This left a net profit, in one instance at least, of more than the cost price. No jury would need any further evidence to justify the conclusion that the charge was exorbitant. And in practically all instances it was shown by the defendant's own witnesses that the net profit, after allowing the extreme amount claimed for the expenses of the business, including overhead charges, was in excess of 50 per cent of the cost price, and that the usual turnover was two or three times a year.

Indeed, no contention seems to be made that these prices did not include unreasonable rates and charges, unless the plaintiffs in error were entitled to base their charges on replacement values instead of cost price. What these replacement values were does not

appear because the evidence on that subject was excluded. There is, therefore, no error in this judgment unless it can be said that the exclusion of this evidence was material error.

In order to reverse a case because of the improper exclusion of evidence, this court must be able to determine from the record that the evidence offered was material. Hence it is not sufficient for the record to show that evidence relating to a given subject was offered, but it must disclose what the evidence would have been if admitted.

In this case the evidence, if admitted, might have shown so slight an advance in the market price as to be entirely insignificant. In that event, it would have been immaterial, even if competent, for its effect would have been to furnish a further justification for the verdict. It is submitted, therefore, that in the absence of anything in the record to show what this evidence would have been, the assignment of error based on its exclusion can not be considered.

CONCLUSION.

It is respectfully submitted that the Act in question is constitutional, that there is no error in the record, and the judgment should be affirmed.

WILLIAM L. FRIERSON,
Solicitor General.

OCTOBER, 1920.

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SUPREME COURT OF THE UNITED STATES.

No. 558.—October Term, 1920.

Weeds, Inc., and Gurdon H. Smith, Plaintiffs in Error, *vs.* The United States of America.	In Error to the District Court of the United States for the Northern District of New York.

[February 28, 1921.]

Mr. Justice Pitney, concurring.

In this case, as in No. 324, *United States* v. *L. Cohen Grocery Co.*, while concurring in the judgment of the court, I am unable to yield assent to the grounds upon which it is based.

Most of the counts in the indictment upon which plaintiffs in error were convicted allege specific violations of that provision of the Act of October 22, 1919 (Ch. 80, sec. 2, 41 Stat. 297, 298, amending sec. 4 of the Act of August 10, 1917, Ch. 53, 40 Stat. 276, 277), which declares it unlawful "to make any unjust or unreasonable rate or charge in handling or dealing in or with any necessaries"; the alleged offenses having consisted in the sale of specific articles of merchandise at excessive prices. Respecting these, my views are expressed in the concurring opinion in the *Cohen Grocery Co.* case.

The remaining count alleges a conspiracy to exact, and to aid and abet in exacting, excessive prices for certain specified necessaries. I see no unconstitutional lack of definiteness in the prohibition of a conspiracy to exact excessive prices for necessaries. In the absence of a statutory definition of, or method of determining, standard prices, with which to compare the prices alleged to be excessive, the natural standard, according to which this provision of the Act ought to be interpreted, is that adopted in the ordinary transactions of men, and adhered to by the common law time out of mind—the standard of fair market value: the price prevailing under current conditions of supply and demand, un-

influenced by manipulation. So construed, I regard this provision as clearly constitutional, and need only refer to *Nash* v. *United States*, 229 U. S. 373, 377. *International Harvester Co.* v. *Kentucky*, 234 U. S. 216, 221-223, is distinguishable. In that case it was conceded, *arguendo*, that a standard fixed by market value under fair competition and normal market conditions was admissible; and the statute was denounced only because in truth it did not apply this standard, but called for an estimate of what prices would have been under non-existent and imaginary conditions. To the same effect, *Collins* v. *Kentucky*, 234 U. S. 634, 638.

I assume (as the court has this day held) that the provision declaring it unlawful "to make any unjust or unreasonable rate or charge in handling or dealing in or with any necessaries" is unconstitutional for want of a definite standard; but this does not carry with it the provision now in question, since by sec. 22 of the Act of August 10, 1917 (40 Stat. 283), it is declared that if any clause, sentence, paragraph, or part of the Act be adjudged to be invalid, this shall not affect or invalidate the remainder, but shall be confined in its operation to the clause, etc., directly involved—a conclusive declaration by Congress that the various provisions of this complicated statute shall be regarded as separable.

The record shows, however, that the trial court repeatedly rejected testimony offered by defendants for the purpose of showing the market value of the goods in question at times material to the controversy, and that exceptions were duly allowed. The effect of the rulings was to deprive defendants of the benefit of this standard, by which the jury might have determined whether the prices defendants agreed to exact for the merchandise were excessive; and for this reason only I concur in the reversal of the judgment of conviction as to this count. As to the other counts, I concur in the reversal upon the ground that the statute, in declaring it unlawful "to make any unjust or unreasonable rate or charge in handling or dealing in or with any necessaries", does not include the exaction of an excessive price for merchandise sold.

Mr. Justice BRANDEIS concurs in this opinion.